IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1923

JAMES O. EASTLAND, ET AL., *Petitioners*

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

NATIONAL PEACE COALITION ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PROGRESSIVE LABOR PARTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D. C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	11
Conclusion	19

Appendix A	1a
Appendix B	67a
Appendix C	69a
Appendix D	71a
Appendix E	81a
Appendix F	85a
Appendix G	86a
Appendix H	88a
Appendix I	88a

CITATIONS

Page

CASES:

Ansara v. Eastland, 442 F.2d 751 (1971) 11
Baker v. Carr, 369 U.S. 186 (1962) 11
Barenblatte v. United States, 360 U.S. 109 (1959) 18
California Bankers Ass'n v. Schultz, Nos. 72-985, 72-1973 and 72-1196 19
Cole v. McClellan, 439 F.2d 934 (1970) 11
Couch v. United States, 409 U.S. 322 (1973) 13
Doe v. McMillan, 412 U.S. 306 (1973) 9, 13, 14, 15, 18
Dombrowski v. Pfister, 380 U.S. 479 (1965) 11
Donaldson v. United States, 400 U.S. 517 (1971) 13, 17
Dombrowski v. Eastland, 387 U.S. 82 (1967) 6, 13
Gravel v. United States, 408 U.S. 606 (1972) ..13, 14, 16, 18
Hutcheson v. United States, 369 U.S. 599 (1962) 12
Kilbourn v. Thompson, 103 U.S. 168 (1881) ...13, 14, 15, 18
Liberation News Service v. Eastland, 426 F.2d 1379 (2d Cir. 1970) 11
NAACP v. Alabama, 357 U.S. 449 (1958) 10, 18
Pauling v. Eastland, 288 F.2d 126 (1960) 11
Powell v. McCormack, 395 U.S. 486 (1969) 11, 13, 14, 16
Sanders v. McClellan, 463 F.2d 894 (1972) 9, 11
Tenney v. Brandhove, 341 U.S. 367 (1951) 13, 16
United States v. Brewster, 408 U.S. 501 (1972) ...13, 14, 15
United States v. Johnson, 383 U.S. 169 (1966) 13, 14

CONSTITUTION AND RESOLUTIONS:

Article 1, Section 6, Clause 1 .....3, 9, 13-16, 18
First Amendment 3, 9, 10, 11, 12, 15, 18, 19
S. Res. 341 5
S. Res. 478 6

MISCELLANEOUS:

87 HARV. L. REV. 55, 230 (1973) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

JAMES O. EASTLAND, ET AL., *Petitioners*

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

NATIONAL PEACE COALITION ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PROGRESSIVE LABOR PARTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The majority opinion of the court of appeals and the opinion of the dissenting judge (Pet. App. A, *infra*, pp. 1a to 65a) are reported at 488 F.2d 1252. In

Eastland v. *United States Servicemen's Fund*, the June 4, 1970, opinion and order (Pet. App. B, *infra*, pp. 67a to 68a) and the July 28, 1970, opinion and order (Pet. App. C, *infra*, pp. 69a to 70a) of the court of appeals on respondents' applications for stays are not reported.

The opinions of the district court in *Eastland* v. *United States Servicemen's Fund* denying respondents' motion for a preliminary injunction (Pet. App. D, *infra*, pp. 71a to 80a) and denying a permanent injunction and respondents' motion to compel further depositions (Pet. App. E, *infra*, pp. 81a to 84a) are not reported.

JURISDICTION

The judgment of the court of appeals in *Eastland* v. *United States Servicemen's Fund* (Pet. App. F, *infra*, p. 85a) was entered on August 30, 1973. The judgment in the remaining three cases was entered on October 26, 1973 (Pet. App. G, *infra*, pp. 86a to 87a). On January 23, 1974, the court of appeals denied a timely petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. H & I, *infra*, pp. 88a-89a) filed on behalf of the Congressional defendants by the United States. On April 18, 1974, Mr. Chief Justice Burger extended the time for petitioning for certiorari in all four cases to and including June 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in four actions brought by organizations against Committees of Congress, their Chairmen, Members and staff, a court can enjoin or declare void under the First Amendment, despite the Speech or Debate Clause and the separation of powers doctrine, subpoenas issued by the Committees to banks requiring

the production of bank records relating to the organizations.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1, of the Constitution of the United States provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

A. The Proceedings Below

This petition relates to four cases initiated by organizations and individuals in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the enforcement of subpoenas issued to banks by Congressional Committees.

In the first of these cases, *Eastland* v. *United States Servicemen's Fund*, petitioners are United States

Senators James O. Eastland, John L. McClellan, Sam J. Ervin, Jr., Birch Bayh, Strom Thurmond and Marlow W. Cook, all of whom respondents in this case sued in their official capacity as Chairman and Members of the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate,[1] and J. G. Sourwine, Chief Counsel of the Subcommittee, who was also sued in his official capacity.[2]

Respondent United States Servicemen's Fund (USSF)[3] was incorporated in 1969 in the State of Delaware as a non-profit membership corporation and, in the same year, was granted an exemption from the payment of federal income taxes (Pet. App. 37a). USSF's certificate of incorporation listed a number of charitable and educational purposes; its activities included establishing "coffee houses" near and on 17 federal military installations and furnishing financial assistance to about 75 newspapers distributed on federal military bases around the world (Pet. App. 37a).

On May 28, 1970, the Senate Subcommittee on Internal Security, over the signature of Chairman Eastland, issued a subpoena *duces tecum* directing

[1] Of the Senators named as defendants in respondents' original complaint, these are the only current members of the Subcommittee on Internal Security.

[2] Respondents' complaint also named the Chemical Bank New York Trust Company as a defendant, although it does not appear that the bank was ever served with the complaint.

[3] Respondents in the USSF case also include Robert Zevin and Corrinna Fales, both of whom were plaintiffs below and were named in the complaint as, respectively, USSF's Secretary-Treasurer and Executive Director.

the Chemical Bank in New York to bring to the Subcommittee on June 4, 1970:

> pursuant to S. Res. 366 81st Congress—2d, as amended and extended, and S. Res. 341, agreed to February 16, 1970, any and all records pertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce.

Pet. App. 4a. Senate Resolution 341 (91st Cong., 2d Sess., 116 Cong. Rec. 3417-3418) cited in the subpoena, authorized the Subcommittee "to make a complete and continuing study and investigation" of the administration of the Internal Security Act of 1950 and laws relating to espionage, sabotage and the internal security of the United States, and the extent, nature and effect of subversive activities in the United States, including such activities by persons under the control of foreign governments or organizations seeking to overthrow of the government of the United States by force or violence (Pet. App. 40a). Pursuant to this authority, the Subcommittee had adopted in May 1970 a resolution stating that a *prima facie* showing had been made that USSF should be the subject of further investigation and authorizing the issuance of subpoenas in aid thereof (Pet. App. 41a-42a).

On June 1, 1970, shortly before the return date of the subpoena directed to the Chemical Bank, USSF and the individual respondents filed a complaint against the Chairman, Members and Chief Counsel of the Subcommittee and the bank. The complaint alleged *inter alia* that the "sole purpose" of the sub-

poena was to "harass, chill, punish and deter" respondents in the exercise of their First Amendment rights and that contributions to USSF from private individuals and foundations will diminish if the bank complies with the subpoena. Respondents sought an injunction restraining the bank from complying with the subpoena and enjoining the Subcommittee Chairman, Members and Chief Counsel from seeking to enforce the subpoena by using the power of contempt, and a declaratory judgment that the subpoena was void and illegal under the Constitution. (Pet. App. 6a).

When the district court refused to issue a temporary restraining order, the court of appeals, with one judge dissenting, ordered a stay in the enforcement of the subpoena pending a hearing on respondents' application for an injunction (Pet. App. 7a-8a). After a hearing, District Judge Oliver Gasch, in an opinion dated June 30, 1970, denied respondents' motion for a preliminary injunction and denied petitioners' motion to dismiss the complaint (Pet. App. 71a to 80a). The court of appeals then stayed enforcement of the subpoena until final disposition on appeal, but urged the district court to allow the case to go to final judgment in the interim (Pet. App. 69a-70a). Thereafter, the district court, holding that the Senators had personal immunity under *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), ordered them dismissed as defendants, thus leaving as defendants only Chief Counsel Sourwine and the bank (Pet. App. 10a).

When respondents sought to depose defendant Sourwine, the Senate passed S. Res. 478, 91st Cong., 2d Sess., 116 Cong. Rec. 36481-82, allowing defendant Sourwine to testify only in regard to matters of public

record. (Pet. App. 65a n. 18). Respondents sought an order to compel further testimony. (Pet. App. 82a).

On October 21, 1971, after a further hearing on February 23, 1971, the district court issued an opinion denying a permanent injunction and rejecting respondents' motion to compel the further testimony of Chief Counsel Sourwine (Pet. App. 81a to 84a).

Respondents then appealed this final order, which appeal the court of appeals combined with the pending appeal from the trial court's denial of a preliminary injunction (Pet. App. 10a). With the USSF case, the court of appeals also combined for argument and decision three cases [4] in which suits had been brought against the Committee on Internal Security of the House of Representatives by organizations seeking to enjoin the enforcement of subpoenas directing various banks to produce records relating to those organizations (Pet. App. 3a).[5]

---

[4] *Progressive Labor Party, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1609); *National Peace Action Coalition, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1693); *Peoples Coalition for Peace and Justice, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-2034).

[5] In each case, the plaintiffs (respondents in this Court) were the named organization, and various officers of the organization; in the *Progressive Labor Party* and the *National Peace Action Coalition* cases, plaintiffs also included "John Doe" and "Richard" or "Mary Roe"—pseudonyms representing anonymous contributors to and members of the organizations. See J. App. 2-3, 31-32, 75-76 ("J. App." refers to the Joint Appendix (Consolidated) filed in the court of appeals in the House Committee cases.)

Defendants in each of these cases—now petitioners in this Court—were the Committee on Internal Security of the United States House of Representatives, its Chairman and Members, its Chief Counsel and its Investigator (*ibid.*).

Also named as a defendant in each case was the bank to which the subpoena was directed (*ibid.*).

These three suits involving the House Committee were on appeal from preliminary injunctions entered by the district court pending the decision of the district court in *USSF*.[6] The constitutional claims raised in each of the three complaints, which sought declaratory and injunctive relief,[7] were the same as those raised in the *USSF* complaint and the district court therefore entered the preliminary injunctions in reliance on the stay orders previously issued by the court of appeals in *USSF*, see p. 6 *supra*.[8]

B. The Majority Opinion in the Court of Appeals

Discussing only the facts involved in the *USSF* case, a majority of the court of appeals[9], with Judge MacKinnon dissenting, reversed the judgment of the trial court in *USSF*, affirmed the orders granting preliminary injunctions in the remaining cases and remanded all four cases for further proceedings.

The court majority rejected the argument that courts could not interfere by injunctive remedies with duly authorized legislative subpoenas. The court reiterated

[6] The District Court, on April 29, 1971, in the *Progressive Labor Party* case, on May 21 and May 28, 1971, in the *National Peace Action Coalition* case, and on May 28, 1971, in the *Peoples Coalition for Peace and Justice* case, entered preliminary injunctions enjoining the banks from complying with so much of the issued subpoenas as required the banks to produce current checks deposited to the organizations' accounts and any available previous checks drawn or deposited to the accounts (J. App. 21, 47, 60, 100).

[7] The National Peace Action Coalition and the Peoples Coalition for Peace and Justice sued for damages as well (J. App. 5-7, 34-37, 78-81).

[8] In all four cases the United States represented the Congressional defendants in the courts below.

[9] Chief Judge Bazelon and Judge Tuttle, sitting by designation.

its ruling in *Sanders* v. *McClellan*, 463 F.2d 894 (1972), that an alleged "chilling effect" on First Amendment rights of a witness subpoenaed by a Congressional Committee does "not outweigh the right of the Subcommittee, acting under valid congressional authority, to make its inquiries * * * free of prior judicial interference" (463 F.2d at 903), but nevertheless held that the bar against prior judicial interference does not apply when the subpoena is addressed to a third party because the complaining parties have "no alternative means to vindicate their rights" other than by an action to enjoin the subpoena (Pet. App. 15a).

The court of appeals further held that while the Speech or Debate Clause protects members of Congress from suit for *authorizing* a subpoena, it does not protect either members or employees of Congress from suit for *issuing* or *serving* an "unconstitutional" subpoena (Pet. App. 22a), apparently because such unconstitutional acts are outside the "legislative sphere" within the meaning of *Doe* v. *McMillan*, 412 U.S. 306 (1973) (Pet. App. 32a-33a). Although the court was unable to identify any act performed by any Member of Congress or the Chief Counsel in the *USSF* case falling outside the "legislative sphere," it reversed the judgment dismissing the Senators as defendants and called for further hearings to determine whether any Member's "presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed" (Pet. App. 35a).

In the view of the majority of the court of appeals, "the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the

constitutional rights of the plaintiffs" (Pet. App. 33a). In reaching this conclusion the majority recognized the "undoubted power of Congress to conduct committee investigations" (Pet. App. 23a), and did not question that the subpoena in the *USSF* case was a valid exercise of that power apart from its claimed effect on the First Amendment rights of the plaintiffs. Rather, the court held that USSF was a "controversial" organization, that exposure of the names of contributors to USSF would deter contributions, and that this showing alone established a violation of the First Amendment rights of the respondents and rendered the subpoena unconstitutional.[10]

C. The Dissenting Opinion

Judge MacKinnon dissented, insisting that the court's decision was "a gross abuse of its judicial powers" (Pet. App. 62a). He found no constitutional violation in the requests for bank records, distinguishing the line of cases beginning with *NAACP* v. *Alabama*, 357 U.S. 449 (1958), on the grounds that "none of them on their facts makes a showing that the lists were requested for a proper purpose" (Pet. App. 49a). He concluded that since the subpoena was a valid exercise of legislative power, the "separation of powers deprives the courts of any further jurisdiction in the matter" (Pet. App. 62a). He also disagreed with the majority's conclusion that the Senators should be reinstated as defendants and with the authorization for

[10] It should be noted that in a consolidated supplemental brief filed after the argument in the court of appeals, respondents stated that the court might lack jurisdiction over the banks and that in any event injunctions solely against the banks would not adequately protect their First Amendment rights.

compulsory testimony to be obtained from the Chief Counsel (Pet. App. 63a & n. 18).

REASONS FOR GRANTING THE WRIT

As the majority of the court below stated, this case presents "a fundamental constitutional question of grave import to which the Supreme Court has not yet given an explicit answer" (Pet. App. 3a). It raises far-reaching questions concerning the degree to which a federal court may intrude into the fact-finding processes of the United States Congress.

In a series of earlier decisions, which were not brought to this Court for review, the Court of Appeals for the District of Columbia Circuit—the only jurisdiction where such suits can be instituted (see *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970))—consistently rejected injunction and declaratory judgment actions asserting the First Amendment rights of subpoenaed witnesses called to testify or to produce documents before Congressional committees. See *Cole* v. *McClellan*, 439 F.2d 934 (1970); *Ansara* v. *Eastland*, 442 F.2d 751 (1971); *Sanders* v. *McClellan*, 463 F.2d 894 (1972). In these decisions—none of which has been approved by this Court even by inference—the D.C. Circuit became, as Judge Tuttle noted, "commit[ted] * * * to the proposition that a freedom of association challenge to a Congressional subpoena is not only a case over which the courts have subject matter jurisdiction, but that such a challenge is a justiciable issue" (Pet. App. 17a-18a).[11] Nonetheless, in each in-

[11] These conclusions conflicted with the earlier decision of the same court of appeals in *Pauling* v. *Eastland*, 288 F.2d 126 (1960), but the court below viewed *Pauling* as undermined by cases such as *Baker* v. *Carr*, 369 U.S. 186 (1962); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Powell* v. *McCormack*, 395 U.S. 486 (1969).

stance the effort to enjoin enforcement of a Congressional subpoena prior to its return was rejected because of the fundamental doctrine that courts should "not lightly interfer[e] with Congress' exercise of its legitimate powers." *Hutcheson* v. *United States,* 369 U.S. 599, 622 (1962).

The cases involved in the decision now under review are the first wherein a court has breached this well-established principle and authorized the grant of "equitable relief to prevent threatened congressional action which assertedly would be a deprivation of the plaintiffs' First Amendment rights * * *." (Pet. App. 13a). Whether this extraordinary result is justified because the subpoena is addressed to a third party, and the party asserting the constitutional claim thus may have no alternative method of obtaining judicial review prior to the subpoena's being obeyed, is an issue that calls for resolution by this Court.

If the decision below is permitted to stand, it will open the doors to lawsuits that could cripple the process of legislative inquiry. Congressional committees are constantly subpoenaing witnesses to testify about other persons or legal entities. The decision below invites those who are the subject of such inquiries to take the committee to court, invoke a constitutional claim, and frustrate the legislative process in the interim while the case winds its way to final judgment. The principle that a witness may not challenge a Congressional subpoena without first refusing to obey and being cited for contempt now may easily be evaded. The courts now will intervene so long as the plaintiff suing for injunctive relief is an organization or other "target" of the investigation whose interests will be affected by the

testimony given or the documents produced, and can claim, along the lines sustained below, that its constitutional objection will be lost if not considered by a court prior to enforcement of the subpoena.

Moreover, despite the fact that a taxpayer has no absolute right to intervene and assert constitutional objections to enforcement of an IRS summons directed to a third party holding his financial records, *Donaldson* v. *United States,* 400 U.S. 517, 522 (1971); *Couch* v. *United States,* 409 U.S. 322 (1973), the decision below provides more ready access to courts when a legislative subpoena is involved. Whether such an unprecedented expansion of the judicial role with respect to Congressional subpoenas should be authorized whenever a party alleges ill-defined First Amendment or other constitutional rights is a question warranting consideration by this Court.

In authorizing judicial interference in the legislative process, the decision below erroneously limits the immunity from suit conferred by the Speech or Debate Clause. On six prior occasions this Court has considered the question whether allegedly unconstitutional actions taken by legislators or their staff were insulated from judicial scrutiny by the Speech or Debate Clause: *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Powell* v. *McCormack,* 395 U.S. 486 (1969); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967); *United States* v. *Johnson,* 383 U.S. 169 (1966); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881). See also *Gravel* v. *United States,* 408 U.S. 606 (1972); *United States* v. *Brewster,* 408 U.S. 501 (1972). These decisions establish that the purpose of the Speech or Debate Clause was "to prevent intimida-

tion [of legislators] by the executive and accountability before a possibly hostile judiciary";[12] that the protection provided by the Clause extends not only to Congressmen but also to their aides "insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself";[13] that this immunity applies "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional";[14] that immunity attaches to all actions by the Congressman or his staff within the "legislative sphere," which includes anything "generally done in a session of the House by one of its members in relation to the business before it";[15] and that the "clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself."[16]

The court below failed to apply these principles when it held that Members of Congress, as well as the staff of each committee, are proper defendants in these cases. While it is hardly apparent on what basis the court held that any activities by these petitioners might be outside the "legislative sphere," it is clear that the only activi-

[12] *United States* v. *Johnson*, *supra*, 383 U.S. at 181; *Gravel* v. *United States*, *supra*, 408 U.S. at 617; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

[13] *Gravel* v. *United States*, *supra*, 408 U.S. at 618; *Doe* v. *McMillan*, *supra*, 412 U.S. at 312-313.

[14] *Doe* v. *McMillan*, *supra*, 412 U.S. at 312-313.

[15] *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204; *United States* v. *Johnson*, *supra*, 383 U.S. at 179; *Gravel* v. *United States*, *supra*, 408 U.S. at 624; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *United States* v. *Brewster*, *supra*, 408 U.S. at 509, 512-513; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

[16] *Powell* v. *McCormack*, *supra*, 395 U.S. at 502-503.

ties suggested by the court as being non-legislative acts —issuing and serving the subpoena—fall squarely within the definition of protected conduct consistently repeated by this Court: anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204, quoted with approval in, *e.g.*, *Doe* v. *McMillan*, *supra*, 412 U.S. at 311. The court's analogy between the activities in this case and the conduct of the Sergeant of Arms of the House of Representatives in the *Kilbourn* case ignores the fact that issuing and serving a legislative subpoena, unlike the arrest made by the Sergeant at Arms, are essential acts in the legislative fact-finding process without which Congressional committees could not function, and are plainly not "beyond the apparent needs of the '*due* functioning of the [legislative] process.'" *Doe* v. *McMillan*, *supra*, 412 U.S. at 311, quoting *United States* v. *Brewster*, *supra*, 408 U.S. at 516.

The only rationale suggested by the court below for its remarkable result was that the acts of the Members and the committee staff were unprotected *because* they "would invade the constitutional rights of the plaintiffs" (Pet. App. 33a). But this rationale makes the existence of immunity from suit turn on the merits of the First Amendment claim, which means that there is no immunity at all.[17]

[17] As Mr. Justice Rehnquist (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Blackmun) stated in his concurring and dissenting opinion in *Doe* v. *McMillan*, *supra*, 412 U.S. at 339:

> A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed.

The necessary result of this decision is that Congressmen and their aides may be "distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions," *Powell* v. *McCormack, supra,* 395 U.S. at 505, any time a committee issues a subpoena—precisely what the Speech or Debate Clause is designed to avoid. Moreover, a trial such as that contemplated by the court below would necessarily entail an inquiry into the purposes or motives of the Congressmen[18] responsible for issuing the subpoena.[19] In the cases where suits against legislators or their aides have been allowed, the record has shown, as this Court stated in *Gravel* v. *United States, supra,* 408 U.S. at 621, that "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act."[20]

Moreover, there is no basis for the conclusion of the court below that the conduct of the defendants infringed upon First Amendment rights and exceeded their authority within the "legislative sphere." There is nothing in this record—in the authorizing resolutions, in the nature of the inquiry or otherwise—to indicate that the Senate Subcommittee's investigation into bank records relating to USSF was anything but a legitimate legislative investigation and, indeed, the majority

[18] See the complaint in *USSF* (Appellants' Appendix A8), which alleged that the "sole purpose for the issuance of the aforesaid subpoena by defendant Committee members and staff is to harass, chill, punish and deter plaintiffs" in the exercise of their First Amendment rights.

[19] See Note, *The Supreme Court, 1972 Term,* 87 Harv. L. Rev. 55, 230 (1973).

[20] See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 377: it is "not consonant with our scheme of government for a court to inquire into the motives of legislators."

never suggested the contrary. As Judge MacKinnon pointed out in dissent (Pet. App. 52a):

> If some of the contributors to the USSF were from "foreign principals," there was a definite congressional interest in determining whether the Foreign Agents Registration Act had been complied with. 22 U.S.C. § 611 *et seq.* Compliance with the Internal Security Act, 50 U.S.C. § 781 *et seq.*, as the enabling resolution stated, was also a legitimate objective of the investigation by the Subcommittee. In addition, the subject matter of these statutes was also a legitimate subject of congressional inquiry in order to determine whether these laws should be retained, repealed or amended to meet new conditions, or whether new laws were needed. It would also be a permissible goal of the investigation to determine whether any of the contributors has been misled by the use of the name "United States" in the name of the organization into believing that the USSF was sponsored or approved by the Government of the United States or by the United States Military services or any other United States department or agency. Cf. 18 U.S.C. § 713.
>
> The condition and efficiency of the military is a matter of vital concern to Congress particularly when large scale foreign military operations, such as were under way in 1970, were being undertaken.

The records sought here by the Subcommittee belonged to the bank, not USSF, and the subpoena for them did not transgress any legal privilege such as attorney-client or doctor-patient or the expectation of privacy that arises from these relationships. Whatever the practice in Switzerland, the courts in this country have never recognized a banker-customer privilege and, as Mr. Justice Douglas stated in his concurring opinion in *Donaldson, supra,* 400 U.S. at 537, "it is difficult to

see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress."

The Subcommittee's actions were not transformed into non-legislative acts, barred by the First Amendment, merely because its subpoena to the bank would have disclosed records relating to USSF. See *Barenblatt* v. *United States*, 360 U.S. 109, 132-134 (1959). *NAACP* v. *Alabama*, 357 U.S. 449 (1958), and other decisions holding that it would infringe upon the freedom of association for state authorities to compel the disclosure of the NAACP's membership lists, cannot be invoked to support a contrary conclusion. In those cases, the state authorities sought membership lists for improper purposes, as the record revealed. There is no such proof here.[21] In any event, the Subcommittee's subpoena did not require disclosure of membership lists belonging to USSF, but rather records belonging to the bank regarding USSF's financial transactions with it. The information contained in these records is doubtless familiar to the bank, including its officers and its numerous employees. If the bank chose to produce it voluntarily, without subpoena, there

[21] See the quotation, at p. 16, *supra*, from *Gravel* v. *United States*, 408 U.S. at 621; see also *Barenblatt* v. *United States*, *supra*, 360 U.S. at 132 ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.")

As to the question of Congress' need for the information sought, see *Doe* v. *McMillan*, *supra*, 412 U.S. at 312, where this Court stated, in response to the claim that the printing of certain information in the record was actionable because unnecessary to the Congressional inquiry, "[c]ases in this Court, however, from *Kilbourn* to *Gravel* preternit the imposition of liability or any such theory."

For state action, there is no constitutional protection from federal judicial scrutiny comparable to the Speech or Debate Clause.

would be no basis for a constitutional claim. On what ground, then, is there a greater invasion of the right of free association if compulsory process is used to obtain the information voluntarily disclosed to the commercial institution? See *California Bankers Ass'n* v. *Schultz*, Nos. 72-985, 72-1073, and 72-1196, decided April 1, 1974 (94 S. Ct. 1494).

The holding of the court of appeals on this question will have the inevitable effect of blocking legislative committees from legitimately inquiring, through the use of compulsory process, into the financing of any organization that a court might term "controversial." Surely, the question whether tax-exempt organizations are funded directly or indirectly by agents of foreign governments is one that Congress has the power and responsibility to investigate. Exposure of such financing may, as USSF argued below, deter financial contributions to these organizations, particularly if the donor is in fact connected with a foreign government; yet, *on that ground alone*, the court of appeals has now held that Congress is barred by the First Amendment from learning the facts.

CONCLUSION

These cases plainly warrant review by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D. C. 20036
Attorneys for Petitioners

June 1974.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,279, 24,412, 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL,
Appellants

v.

JAMES O. EASTLAND, ET AL

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL,
Appellants

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL,
Appellants

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Appellants

Appeals from the United States District Court
for the District of Columbia

Decided August 30, 1973

Nancy Stearns and *Jeremiah S. Gutman* with whom *Philip J. Hirschkop* were on the brief, for appellants in No. 24,279, 24,412 and 71-2034.

Robert L. Keuch, Attorney, Department of Justice with whom *Richard S. Stolker*, Attorney, Department of Justice were on the brief, for appellees in No. 24,279, 24,412 and 71-2034. *Benjamin C. Flannagan*, Attorney, Department of Justice also entered an appearance for appellee in No. 24,279.

Robert L. Keuch, Attorney, Department of Justice with whom *Garvin Lee Oliver*, Attorney, Department of Justice was on the brief, for appellants in No. 71-1609, 71-1693, and 71-1717. *Benjamin C. Flannagan*, Attorney, Department of Justice also entered an appearance for appellants in No. 71-1609, 71-1693 and 71-1717.

Burt Neuborne of the Court of Appeals of New York with whom *Jeremiah S. Gutman* and *Hope Eastman* were on the brief, for appellees in No. 71-1609, 71-1693, and 71-1717.

Before BAZELON, *Chief Judge*, TUTTLE,* *Senior Circuit Judge* for the Fifth Circuit, and MACKINNON, *Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TUTTLE.

Dissenting opinion filed by *Circuit Judge* MACKINNON at p. 37.

TUTTLE, *Circuit Judge*: This case, combined for argument and consideration on appeal with cases numbered 71-1609, 71-1693 and 71-1717, presents the court with the task of deciding a fundamental consititional question of grave import to which the Supreme Court has not yet given an explicit answer. The question is: Have the courts of the United States the power to interfere with the subpoena power as exercised by committees of the United States Senate and House of Representatives when the exercise of such power threatens a deprivation of First Amendment rights of freedom of association which can be vindicated in no way other than by court decree?

This difficult question comes to this court by appeal from denial of an injunction by the trial court. It is an action by United States Servicemen's Fund, et al., v. Eastland, et al., chairman, members and counsel for the Sub-Committee on Internal Security of the Committee of the Judiciary of the United States Senate and the Chemical Bank New York Trust Company. The history of the litigation and its origins, so far as necessary to our consideration of the issues on appeal follows:

On May 28, 1970, there issued over the signature of Honorable James O. Eastland, Chairman, Committee on the Judiciary and Sub-Committee on Internal Security of the United States Senate a subpoena directed to Chemical Bank in New York City commanding it to bring to the Sub-Committee

---

*Sitting by designation pursuant to 28 U.S.C. §294(d).

on Internal Security on June 4, 1970, at the committee room, 2300 New Senate Office Building, Washington, D.C., at 10 o'clock a.m.

> "pursuant to S. Res. 366, 81st Congress – 2d, as amended and extended, and S. Res. 341, agreed to February 16, 1970, any and all records pertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce."

On or about June 1, 1970, a complaint was filed by USSF against the stated defendants and an application for temporary restraining order prohibiting the execution of the subpoena was filed with the United States District Court for the District of Columbia. The plaintiffs asserted that they were a non-profit, tax-exempt membership corporation to further the welfare of persons who have served or are presently serving in the military.[1]

[1] A fuller description of the activites and purposes of the plaintiff organization, which are not now challenged, are described in the complaint as follows:

"United States Servicemen's Fund (hereinafter, USSF) is a non-profit tax-exempt membership corporation incorporated in the State of Delaware to further the welfare of persons who have served or are presently serving in the military. Among its charitable, educational and legal purposes and powers as stated in its certificate of incorporation are the following:

> 1) to stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:
> 2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;
> 3) Executing, sponsoring and encouraging research designed to improve the general welfare of military personnel;
> 4) Contributing to the costs of legal representation of military personnel;

The challenge to the validity of the subpoena included an attack on the overbreadth of Resolutions 366 and 341, the vagueness and ambiguity of such resolutions and that the subpoena issued under the resolutions

> "violates plaintiffs' rights under the United States Constitution and particular their rights of privacy and their rights of freedom of speech, freedom of press, freedom of association and freedom from unreasonable search and seizure as guaranteed by the First, Fourth, Fifth, Ninth and Tenth Amendments."

The petition also alleged on information and belief that the subpoena was issued against the defendant, Chemical Bank New York Trust Company, rather than directly against the plaintiffs in order to deprive plaintiffs of their rights to protect their private records, such as the sources of their contributions, as they would be entitled to do if the subpoenas had been issued against them directly. It further alleged

> 5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;
> 6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life.

In furtherance of these purposes USSF provides funds for (a) the establishment and operation of coffee houses, which are gathering places, and places of recreation for persons in military service as well as the providing of entertainers for military personnel; (b) the establishment and operation of newspapers which provide information particularly of interest to military personnel; (c) the supplying of educational materials such as films, books periodicals, and entire libraries for military personnel; (d) the providing of civilian legal representation for military personnel due to the inadequacies of military justice.

Both the G.I. coffee houses and newspapers have become the focus of dissent and expressions of opposition within the military toward the war in Vietnam and now Cambodia, and are frequent targets of repressive actions by both civilian and military authorities seeking to silence dissent. All of the activities of USSF are conducted in exercise of its rights under the United States Constitution and particularly the First Amendment guarantees of Freedom of speech, press and association."

"the financial support of USSF, which permits it to continue its activities, in furtherance of the welfare of military personnel, is obtained exclusively through contributions of private individuals and foundations. Plaintiffs believe that if the Chemical Bank is forced, under a threat of contempt of Congress, to comply with the aforesaid subpoena and provide a sweeping array of documents demanded by the Sub-Committee, much of that financial support will be withdrawn and USSF will be unable to continue its constitutionally protected activities."

The petition finally alleged

"unless the enforcement and operation of the subpoena and the resolutions pursuant to which it was authorized are restrained by this court, immediate and irreparable harm will be done to the plaintiffs and to the entire nation by the curbing of freedom of the press and of dissent."

The complaint prayed for a permanent injunction restraining the bank from complying with the subpoena by in any way "disclosing, revealing or delivering any records, papers, correspondence, statements, checks, deposit slips, supporting documents or microfilm" to the committee; and restraining defendant Sub-Committee members and staff counsel from seeking to enforce the said subpoena by use of the power of contempt of Congress or any other means. It also sought a declaratory judgment holding that the aforesaid subpoena is void and illegal under the United States Constitution and that Senate Resolution 366 and 341 are void and illegal under the United States Constitution.

The case having come on for hearing on plaintiffs' application for temporary restraining order the trial court stated

"upon consideration of the application and argument of counsel in chambers and it appearing to the court that this court lacks subject matter jurisdiction, the plaintiffs lack standing to sue, and that plaintiffs failed to

demonstrate probability of success on the merits, it is by the court this first day of June, 1970, ORDERED that plaintiffs' application for a temporary restraining order be, and the same is, hereby denied."

Thereafter, application was then made to this court for a stay in the enforcement of the subpoenas and this court, Judge MacKinnon dissenting, entered the following order:

"This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

It appears, however, that serious constitutional questions are presented by this litigation which require more time than is presently available for proper consideration. *See Stamler* v. *Willis*, 7 Cir., 415 F.2d 1365 (1969). The Second Circuit has, in similar circumstances, involving the same appellees, issued a temporary restraining order in order to assure appropriate consideration by the federal courts in the District of Columbia. *Liberation News Service* v. *Eastland*, 2 Cir., ___ F.2d ___ (No. 34,588, decided April 10, 1970).

In denying temporary relief, the District Court assumed the court entirely lacked jurisdiction. This assumption is doubtful indeed in view of the fact that parties defendant include the cognizant counsel of a committee and the private party to whom plaintiffs have entrusted information. *Stamler* v. *Willis, supra; Hearst* v. *Black*, 66 App.D.C. 313, 87 F.2d 68 (1936).

It appears to the court that the issues involved, as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order.

The decisive element in our action to grant a stay is like that which moved the Second Circuit, because unless a stay is granted this case will be mooted, and there is likelihood, that irreparable harm will be suffered by appellants, at 10:00 a.m. this morning.

It is ORDERED by the court that the emergency stay requested by appellants be granted until the District Court has an opportunity fully to consider and to act on this matter, and it is

FURTHER ORDERED by the court that consideration of this case be expedited by the District Court.

Judge MacKinnon is of the opinion that the question is not free from doubt but would deny the stay on the record made before the trial court on the grounds that the subpoena was issued for a valid legislative purpose and that the balancing of the legislative power of Congress, including the ancillary power to investigate to determine what legislation may be necessary, against defendants' claimed First Amendment rights, leads to the conclusion that the balance prevails in favor of the governmental interest and that plaintiffs will not prevail on the merits. *Barenblatt* v. *United States*, 360 U.S. 109 (1959)."

Responding to that part of this court's order that consideration of this case be expedited by the district court, the trial court held a hearing on the motion for preliminary injunction promptly thereafter and entered its order denying the injunction on June 30, 1970. By the same order the trial court denied the defendant's motion to dismiss the complaint.

Thereafter an order of this court stayed enforcement of the subpoena until final disposition of the case on appeal, but recommended that in the meantime the case go to final judgment in the district court. For convenient reference, this order, together with the dissent, is here set out:

No. 24,412

United States Servicemen's Fund, et al.

v.

James O. Eastland, et al.

Before: Wright, Leventhal, and Mackinnon, Circuit Judges, in Chambers.

ORDER

"This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

The stay granted by the Court on July 2, 1970, requires expeditious disposition of this case. Since the calendar for the September sitting of this Court has already been prepared and assigned, the case is hereby assigned to the October sitting. This will obviate the delay which would have been involved if the Clerk had followed the standard practice of including in the calendaring for the October sitting only those cases for which briefs had been filed prior to the date of preparation of the calendar.

It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler*, 38 U.S.L.W. 3522 (June 30, 1970). It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules. By expeditionof that appeal and consolidation with the instant appeal, it may be possible both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge.

Per Curiam

MacKinnon, Circuit Judge: I would refuse to grant a further stay and would affirm the District Court on the ground principally that appellants are not likely to succeed on the merits. For this reason, I also conclude that mooting the case will not cause them irreparable injury. Appellants are seeking to establish a privileged status not provided for by the law. Furthermore, the names of contributors to such activities is a matter of

> vital concern to Congress; and within its power to investigate, and it should not be further frustrated in its proper effort to get on with its business of legislating with respect to the evils created thereby, if investigation confirms same."

Upon motion of the defendants who are United States Senators the trial court, although having theretofore overruled a motion to dismiss, ordered that the defendants who were Senators should be dropped as parties defendant, the court stating

> "it appearing on the record that said defendants are United States Senators, the court concludes that said defendants are personally immune from suit. Dombrowski v. Eastland, 387 U.S. 82 (1967)."

Thereafter, on February 23, 1971, the trial court held a hearing on the motion for permanent injunction and on plaintiffs' motion for compelling the testimony of defendant Sourwine, counsel for the committee. The court denied both the injunction and the application for taking of the committee counsel's testimony by its order of October 21, 1971.

This final order was then appealed and the appeal was combined with the pending appeal from the denial of preliminary injunction. The appellants here, the plaintiffs below, complain of (1) the denial of a preliminary injunction, (2) the dismissal of the members of the Sub-Committee on Internal Security as parties defendant, (3) the denial of an order compelling the testimony of defendant Sourwine, and (4) the denial of a permanent injunction.

The appellees, represented by the Department of Justice, state their contention in several "issues" which may be compressed into the following: (1) Do plaintiffs have standing to enjoin the execution of this subpoena when issued to a third party bank which has exclusive possession, custody and

control of such records; (2) Do plaintiffs in the exercise of their First Amendment rights to association have standing to enjoin "an investigation being conducted by a congressional sub-committee".[2] (3) Does this complaint seeking relief against United States Senators in their official capacity and against staff counsel state a case or controversy within the meaning of Article III, Section 2 of the Constitution; (4) Assuming jurisdiction, which is challenged, should a federal court, pursuant to the doctrine of separation of powers, and as a matter of judicial restraint, abstain from exercising that jurisdiction "by enjoining the execution of a validly authorized subpoena duces tecum" under the facts of this case; (5) Is the Senate Resolution authorizing this Sub-Committee's investigation unconstitutionally vague or overbroad; (6) May a federal court refuse to enjoin a congressional investigation where plaintiffs failed to demonstrate a threat of irreparable injury sufficient to outweigh the legislative interest in conducting that investigation; (7) May a federal court refuse to compel an attorney employed by the legislative branch of the government to testify as to matters within the possession and control of the Congress which relate to the underlying basis for a congressional investigation and as to which the Congress has asserted its privilege of legislative immunity.

The defendants, of course, assert that the trial court erred in not dismissing the complaint. In other words, they take the position that, even though all of the allegations in the complaint were to be taken as true, the United States District Court did not have, or should not exercise, jurisdiction because of what must be construed to be an assertion of absolute legislative immunity so long as the actions engaged in

---

[2] It is clear that these plaintiffs do not seek to enjoin the investigation being conducted by the Internal Security Committee. They seek only to enjoin the enforcement of this particular subpoena.

by the members of the committee and its counsel occurred during the course of valid legislative investigatory proceeding.

Before dealing with the several specific grounds upon which the parties rely we think it appropriate to make plain a fundamental principle which this court has uniformly recognized as of critical significance in cases such as this, in which the courts are asked to intervene to prevent an alleged deprivation of the complaining parties' constitutional rights by actions undertaken by one of the Houses of the United States Congress or by a committee or sub-committee thereof. This principle was stated in Hutcheson v. United States, 369 U.S. 599, 622:

> "In conclusion, it is appropriate to observe that just as the Constitution forbids the Congress to enter fields reserved to the executive and judiciary, it imposes on the judiciary the reciprocal duty of not lightly interfereing with Congress' exercise of its legitimate powers."

The principle is restated by this court in Ansara v. Eastland, 442 F.2d 751 (D.C. Cir., 1971) where, at page 753, this court said

> "First, the plaintiffs seek relief that would precede and seek to relate to the conduct of a future legislative hearing. The courts avoid use of extraordinary remedies that involve 'needless friction' with a coordinate branch of the government."

Citing Railroad Commission v. Pullman Co., 312 U.S. 496, 500, 61 S. Ct. 643, 85 L. Ed 971 (1941); Davis v. Ichord, 442 F.2d 1207 (August 20, 1970). More recently in Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972) at page 902 this court said

> "the judiciary has the duty 'of not lightly interfering with Congress' exercise of its legitimate powers' Hutcheson v. United States, 369 U.S. at 622, 82 S. Ct. at 1017. We recently discussed this duty at some length in Ansara v. Eastland, supra."

This fundamental doctrine has resulted in many courts staying their hand when equitable relief was sought by plaintiffs who alleged that pending or threatened actions by committees of Congress would result in a violation of their constitutional rights (most frequently First Amendment rights). See, in addition to the cases cited, Cole v. McClellan, 439 F.2d 534 (D.C. Cir., 1970).

Were the present case cast in the mold of those in which this court has declined to grant equitable relief to prevent threatened congressional action which assertedly would be a deprivation of the plaintiffs' First Amendment rights, we would, of course, be bound by these decisions and we would, moreover, agree that the basic principle which stayed the hand of the court was one which may be properly invoked in every case in which full relief can be granted to the complaining party in some manner other than through the equitable powers of the court. Concluding, as we do, that this case differs in fact from those which have been discussed in that none of the means by which the plaintiffs' constitutional rights can be vindicated, which existed in all of the previous cases, are here present, we are compelled to face the stark issue: Has the court the power, either by injunction or declaratory judgment, to stay the issuance, service on, or enforcement against, a third party of a subpoena authorized by a congressional committee (whether constitutionally valid or not) when a failure to do so would in and of itself result in a serious deprivation of the right of free speech and assembly guaranteed by the First Amendment?

The critically important factual posture of this case which distinguishes it from those in which this court has heretofore denied injunctive relief is apparent. The importance of the distinction is clearly indicated in Sanders v. McClellan, supra. In that case the plaintiff sought to have the district court enjoin the enforcement of a subpoena *duces tecum* issued to

him. The basis for the relief sought was that a compliance with the subpoena by Sanders would result in publication to the world of the names of certain writers for his magazine, which forced involuntary disclosure was claimed by him to be prohibited by the First Amendment. The court made a painstaking analysis of the competing rights of the Congress to legislate, including the right to conduct committee investigations relevant to the legislative purpose, and the right to freedom of association and of the press which the court held to be a protected right.

In Sanders we recognized that the restraint on the courts, vis a vis the legislative branch, prohibits the court from intervening "prematurely or unnecessarily." The court clearly implied that the restraint on the courts was not absolute any more than was the First Amendment right absolute. We recognized that the competing interests in the Sanders case could be harmonized because Sanders could test the validity of his claim to freedom from interference with his First Amendment rights by simply refusing to honor the subpoena; by then undertaking to convince the committee of the rightness of his constitutional stand; then, if unsuccessful, appealing to the Senate, which, in the end must vote a contempt citation; or, still being unsuccessful, seek to convince the executive (the attorney-general's representative) not to prosecute; or, ultimately, if still unsuccessful, and, if tried, stand on his constitutional rights in the trial court and thereafter on appeal.

This court in Ansara, supra, carefully explained its denial of an injunction pending appeal. In a case in which the subpoenas *duces tecum* were served directly on the persons claiming their First Amendment rights the court decided that it should not create "needless friction" by interfering with the committee's action when Ansara, et. al., could accomplish the same result result by contesting the subpoena and subjecting themselves to possible contempt proceedings. The court said:

> "... we first note that the plaintiffs will have an opportunity to present their constitutional objections to the Sub-Committee. Hence the case is to be distinguished, as government counsel points out, from one where plaintiffs were not subpoenaned and would have no way to claim their constitutional protections at the time of committee's questioning."

In both of these cases there was strongly implicit the inference that but for the other means available to the plaintiffs to prevent the loss of their First Amendment rights the court would, of necessity, have viewed the two cases quite differently. Not only is this implicit from the court's statement, quoted above, but it appears from the language of the court in Ansara that government counsel also sought to point out the distinguishing characteristics when the court had before it a case in which a refusal to intervene before execution of the subpoenae would not of itself amount to a denial of the plaintiffs' rights.

Here, in this case, we have the case which is distinghished by this court in both Sanders and Ansara and apparently by the government in its argument in the latter case. *Here the plaintiffs have no alternative means to vindicate their rights.* They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.

SUBJECT MATTER JURISDICTION

The trial court determined that it had subject matter jurisdiction in this case. In doing so it recognized the distinction between determining whether a federal court has "jurisdiction of the subject matter," and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." See Powell v. McCormack, 395 U.S. 486, 512,

where the Supreme Court made reference to the distinction drawn in Baker v. Carr, 369 U.S. 186, 198 (1962). In Baker v. Carr, the Supreme Court enunciated two aspects of subject matter jurisdiction relevant to this case: (1) does it fall within the "case or controversy" restriction of Article III, Section 2, and (2) if so, has Congress exercised its power to assign jurisdiction to the Federal District Courts? In light of the treatment given cases in which relief was denied, but as to which this court has entertained jurisdiction, we think there is no doubt but that the district court had subject matter jurisdiction. See Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972) and Ansara v. Eastland, supra. A suit brought by one whose constitutional rights are allegedly violated is certainly a "case or controversy" in the Article III sense, and the fact that plaintiffs claim that their First Amendment rights were violated in an amount exceeding $10,000 brings this dispute within the purview of 28 U.S.C. § 1331:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States."

The defendants, as a subsidiary argument as to want of jurisdiction, contend that USSF lacked standing to bring the action because they do not meet the requirement that they show

> "such a personal stake in the outcome of the controversy as to assure that concrete adverseness, which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

They also claim that

> "there is nothing whatever to demonstrate that appellants are aggrieved parties by virtue of direct injury, or that they have the necessary stake in the challenged subpoena to satisfy the 'case' or 'controversy' requirements of Article III, Section 2 of the Constitution."

This they contend results from the fact that the subpoena was not directed to appellants, but to a third party commercial bank. This is a makeweight argument at best. If the forced disclosure of the information concerning contributors to and membership in the appellant association violates its First Amendment rights, then it is too clearly an aggrieved person when a third person is under compulsion by the defendants to disclose this information to warrant discussion. If there were otherwise any doubt on this score it has certainly been resolved by Pollard v. Roberts, 393 U.S. 14 (1968), affirming the judgment of a three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968). That court enjoined a state prosecuting officer from subpoenaing party records of the Republican party of the state of Arkansas over the objection that the execution of the subpoena would result in an invasion of the rights of the plaintiffs to freedom of association and freedom of speech.[3]

JUSTICIABILITY

Both Sanders v. McClellan and Ansara v. Eastland, *supra*, commit this court to the proposition that a freedom of association challenge to a Congressional subpoena is not only

---

[3] Recognizing as they do, that, since had the subpoena been served on the plaintiffs themselves, prior decisions of this court and of the Supreme Court would have made equitable intervention of the court unavailable to interfere with the execution of the subpoena, the plaintiffs here posit their entire right to equitable intervention of the district court on the *fact that the subpoena was served on a disinterested third party* who cannot be expected to test out the legality of the subpoena by subjecting itself to contempt procedures by the Committee or in any other way which would be available to the aggrieved association itself. Cf. Ansara v. Eastland, *supra*, and Sanders v. McClellan, *supra*.

a case over which the courts have subject matter jurisdiction, but that such a challenge is a justiciable issue. It is only in order to further clarify the parameters of the justiciability challenge and to relate the contention of Senatorial immunity to justiciability that we do not summarily dispose of this question on the basis of Sanders and Ansara alone.

Justiciability embodies two limitations upon the exercise of judicial power: (1) Is the question presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process? and (2) Has resolution of the question been entrusted to the judiciary under the Constitution? The former question is posed here in the form of whether courts may fashion effective relief where the sole remedy lies in the entry of an order running against members of Congress. The second question is whether judicial efforts to fashion relief would be unwarranted intrusion into the arena of political questions.

Powell v. McCormack, 395 U.S. 486 (1969) thoroughly disposes of the question as to whether a court of equity may enter an order against staff members of House or Senate:

> "Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to 'mold effective relief for resolving this case.' Respondents emphasize that petitioners ask for coercive relief against officers of the House, and, they contend, federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts. Respondents rely primarily on the speech or debate clause to support this contention.
>
> "We need to express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the district court could have issued . . . We thus conclude that in terms of the general criteria of justiciability, this case is justiciable." 395 U.S. at 512.

The availability of declaratory relief against officers of the House, which was all that was necessary in Powell, was clearly viewed by the Supreme Court as a mechanism whereby effective relief against Congressional action could be molded by the courts. Likewise, in Doe v. McMillan, ____ U.S. ____ (1973), 41 LW 4752, publication and public distribution of allegedly defamatory and privacy-invading literature by personnel other than members of Congress subsequent to authorization of publication by a House subcommittee, itself immunized, was not protected action under the Speech or Debate Clause.

Appellants have not been able to cite any case by the Supreme Court, or by Courts of Appeal, in which a federal court has finally enjoined named committee members of the Congress by way of granting coercive relief of the nature sought here. However, much has been said both by the Supreme Court and by this court clearly implying that the statutory – equitable relief of issuing a declaratory judgment as to the validity of action taken to give effect to protected Congressional committee action might be proper in such a case as this. Probably the strongest statement bearing on this difficult issue is that in Gravel v. United State, 408 U.S. 606, where, in his opinion for the court, at page 621, Mr. Justice White said:

> "None of this, as we see it, involves distinguishing between a senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, *in order to secure information for a hearing, themselves* seized the property or *invaded the privacy of a citizen.* Neither they

nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." (Emphasis added.)

In considering whether this litigation poses a political question which is "not justiciable primarily because of the separation of powers within the Federal Government," Powell v. McCormack, 395 U.S. at 518, we begin with the formulation of the political question doctrine set forth in Baker v. Carr, 369 U.S. 186 (1964):

> "After reviewing our decisions in this area, we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:
>
> " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multi-farious pronouncements by various departments on one question.' 369 U.S., at 217."

Like Sanders v. McClellan, 463 F.2d at 897, our case falls within none of these six categories, though (1) whether there is a "textually demonstrable constitutional commitment of the issue to coordinate political department" and (2) whether there exists "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government" merit further analysis.

In Powell, the respondents contended that Art. I, Sec. 5, Clause 1[4] of the Constitution was a 'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power" to determine Powell's qualifications. After first determining "what power the Constitution confers upon the House through Art. I, Sec. 5," 395 U.S. at 519, the Supreme Court proceeded to hold that this provision committed to Congress the power "to judge only the qualifications expressly set forth in the Constitution." 395 U.S. at 548. Powell concededly met these qualifications and was not excluded by the House for failure to meet these, so the Court held that his exclusion by the House on other purported grounds of disqualification was justiciable.

In the case before us there is also no "textually demonstrable commitment" of the issue we are called upon to resolve. The government does not contend that the Speech or Debate Clause, Art. I, Sec. 6, Cl. 1[5] of the Constitution is such a commitment and since it could not seriously be contended that the acts giving effect to the committee resolution (like the conduct of the Sergeant of Arms in the Kilbourn case)[6] are within the protection of the Speech or Debate Clause, this Clause does not commit to the Senate the power to determine the legality of the subpoena.

---

[4] "Each House shall be the judge of the elections, returns and qualifications of its own members . . . ."

[5] "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same and for any speech or debate in either House, they shall not be questioned in any other place."

[6] Kilbourn v. Thompson, 103 U.S. 168 (1881).

In Doe v. McMillan, ___ U.S. ___ (1973), 41 LW 4752, the Supreme Court determined that the Speech or Debate Clause protected committee members

> "for introducing material at committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report," Id. at 4754.

but did not protect even members of Congress insofar as they published the report subsequently to the general public. By way of explanation, the Court said that

> "a member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report." Id. at 4755.

Analogizing to the instant case, we think the Speech or Debate Clause does protect the Senatorial parties from liability for *authorizing* even an unconstitutional subpoena, but does not protect whatever parties *issue or serve* such a subpoena upon a third party.

We conclude, therefore, that the issue presented by this complaint is one over which the court has subject matter jurisdiction; it is justiciable; it cannot be challenged on the ground that it deals with a "political question" or on the basis of legislative immunity..

THE RIGHTS CLAIMED TO BE VIOLATED

The United States Servicemen's Fund bases its claim for relief principally upon a threat to the right of freedom of association and assembly and protest under the First Amendment. It also, however, attacks the validity of the subpoena on the ground that the record discloses that neither the Senate Resolution, nor the Committee's resolution thereafter nor the specific resolution authorizing the chairman to issue subpoenas in support of an investigation of USSF has

It is clear that the factual weakness of the plaintiff's case, as viewed by the trial court, weighed heavily in its decision to deny the preliminary injunction.[6]

Although the evidence of damage, necessarily opinion evidence because no time had elapsed to permit proof of actual loss, was substantial, we need not determine whether this fact finding of the trial court was clearly erroneous. This is true because following this court's stay order of July 28, 1970, the trial court held an entirely new hearing of the case on the merits. In doing so the court followed the suggestion contained in this court's order:

> "It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d, 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler* 38 U.S.L.W. 3522 (June 30, 1970). It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules. By expedition of that appeal and consolidation with the instant appeal, it may be possible

[6] "But plaintiffs' witnesses could do little more than speculate as to the effect that disclosure of their contributors would have. Moreover, several contributors are said to have remained anonymous even from U.S.S.F. officials; manifest disclosure of Bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity. The showing of plaintiffs with respect to the adverse effect on contributors falls far short of establishing the requisite element of a preliminary injunction, namely, irreparable injury. *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958). In the face of such a strong legislative (and public) interest in the investigation at issue here, plaintiffs' showing of injury to First Amendment rights is insufficient to warrant a finding of probable success at a full trial, *cf. NAACP v. Alabama, supra*, and coupled with the validity of the Subcommittee action, certainly is an insufficient basis for granting injunctive relief against a committee of Congress. *Cf. Dombrowski v. Pfister*, 380 U.S. 479 (1965).

the specificity required by law before such a subpoena can issue. In view of the fact that USSF is not the subject of the subpoena itself, we think the relevance of its attack on the absence of a showing of any nexus between the organization and the stated purpose of Congress is to be viewed only as it bears upon the necessity for the courts to balance the power of Congress to conduct its legislative procedures over against the First Amendment rights of the citizen. We, therefore, turn to the alleged deprivation of constitutional rights which USSF says would inevitably occur unless the subpoena were invalidated.

The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state of federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times. See NAACP v. Alabama, 357 U.S. 449; Bates v. Little Rock, 361 U.S. 516; Louisiana ex. rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Committee, 372 U.S. 539 (1962); Pollard v. Roberts, 393 U.S. 14 (1968), affirming the judgment of the three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968).

In its denial of the motion to dismiss the petition, entered at the same time as the order denying the preliminary injunction, the trial court properly determined that, upon the facts shown "there has been no evidence that any of its [USSF's] activities, or those it supports, have been of a type not protected by the First Amendment." The court, however, in balancing this right against the undoubted power of Congress to conduct committee investigations, found that the proof of irreparable damage to the plaintiffs was lacking. Such proof being absent, and the Court having determined it could not find "probably success at a full trial," it determined that a preliminary injunction should be denied.

> both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge."

At this subsequent hearing on the merits for permanent injunction, following this court's order, the plaintiff greatly bolstered its proof of monetary injury, both by opinion testimony touching on the effect of subpoenaing the records of such a controversial organization, and by testimony by officials of the organization of substantial loss of subscriptions from potential and former supporters. The trial court foreclosed the plaintiffs from eliciting answers to questions put to officers and fund raisers who were witnesses at the trial in which the plaintiffs sought to show that certain substantial contributors had stated as a reason for not contributing a "fear of publicity attendant upon their having their identity revealed, especially the Congress investigating committee which motivates them to withhold donations which they in the past have made and are now refraining from making for that purpose." The court sustained an objection to such testimony on the ground that it was "hearsay".[7] It is questionable whether the testimony sought to be given was objectionable as hearsay, because the statements which the witnesses undertook to make to the effect that identified persons gave as the reason for not contributing their fear outlined above would seem to be admissible to show that the fundraising efforts of USSF were being interfered with because of the existence of the investigation. Such statements would not, of course, be admissible to prove the truth of the reason for not giving that the witness would say the potential contributor had given

[7] This proposed testimony was put into the record as a proffer, when the objection was sustained.

him. However, we do not need to resolve this question, for the court permitted opinion testimony from several professional fund-raisers as well as testimony, not objected to, that certain potential donors had stated the reasons to be such "fear" although earlier witnesses were not permitted to testify.

One of the professional witnesses, a professional fund-raiser,[8] gave the following opinion based on his experience as an expert in this field:

> "Fund raising is a very competitive thing. The reason we have many fund raisers as a profession is we don't create causes, but we do have an expertise in how to motivate people who want to give to various causes, in the peace movement itself, I think the Servicemen's Fund or a cultural organization, or a peace organization, there are dozens of organizations vying for the donor's dollar. Anything which can discourage people, anything which leads people to decide to deflect their contribution from one organization to another can be fatal to a fund raising effort of the particular organization. Certainly they feel their names might be turned over to a Congressional Committee which might be publicized, that there would be publicity about the fact that he had donated could have a devastating effect on fund raising of any organization."

One other professional fund raiser with some 17 years experience of the same kind, testified in much the same terms. Finally, in cross-examining the fund raiser and secretary-treasurer of USSF, the following exchange occurred:

> "Q. [by Government Counsel] You testified to some diminution in contributions received. I take it you are not attempting to say in all cases as to every donor and any particular potential donor exactly why or why not that

[8] This witness had for 20 years raised funds for "cause organizations", ACLU, Youth March for Integrated Schools, The Independent Socialists League, The League for Industrial Democracy, The A. Phillip Randolph Institute and others.

> individual has in fact ceased to contribute as much as they had before or perhaps you didn't get a contribution?
>
> A. That is correct, and certainly I am aware of specific cases, to me at least, the cause is quite apparent, the publicity about the subpoena."

Explicit testimony was given that approximately a 50 percent curtailment in money distributed by USSF for maintainance of coffee houses and supporting a large number of G.I. newspapers had occurred during the period following the service of the subpoena and that this was approximately "a reflection of the drop in contributions." These payments were significant in amount, "from roughly $10,000 a month to $5,000" in the eight month period (the subpoena was served on April 20, 1970; the trial was held on February 23, 1971).

The government made no effort to produce any contrary evidence.[9]

The trial court held the matter under advisement from February 23,1971 until October 21, 1971, at which time it denied the plaintiffs' motion for permanent injunction, and denied their motion to compel testimony from General Counsel Sourwine, of the Committee. In the meantime, this court's stay had been in effect. Thereafter it has been stayed under the earlier order of this court "pending further order of this court".

Strangely enough, following a hearing on the merits as directed by this court in its stay order of July 28, 1970, particularly to permit "a question of importance [to be] determined with the best available perspective, *both as to*

[9] On cross-examination of several plaintiffs' witnesses the government got some affirmative response to the question whether the very fact of an investigation by the Senate Committee might not result in producing some otherwise not forthcoming funds. No witness, however, varied from his testimony that the enforcement of the subpoena was and/or would be seriously damaging in the net result.

underlying evidence and the appraisal thereof by the district judge" (emphasis added), the trial court not only did not make any appraisal of the evidence introduced at the trial on the merits, but it made no finding of fact in relation to it and did not indicate that the evidence at the trial was any different from that introduced on the hearing for preliminary injunction. The court merely said "as neither the hearings on the motion nor the supporting briefs raised new matter, the court relies on its memorandum of June 30, 1970, in which these issues are fully discussed, and finds no violation of the First of Fifth Amendments."

Regardless of whether the evidence of injury was adequate in June, 1970, to require the trial court to issue a preliminary injunction, there can be no doubt that the undisputed evidence at the trial unmistakably establishes the fact that immediate and irreparable injury would result from the execution of the subpoena. One evidentiary fact that emerged in addition to the testimony of actual damage which was not before the court at the preliminary hearing, was testimony that the identity of even ostensibly anonymous and secret donors would be disclosed by examination of the bank's records. From what we know of the methods of discovery available to the Committee this evidence is convincing. Moreover, the government's brief makes crystal clear the fact that the purpose of the subpoena was to ascertain the names of the contributors to the fund and that this would be an effective means to accomplish it.":

> "The information sought to be subpoenaed herein consists of the bank records relating to appellant organization. Those records may shed considerable light on various pertinent questions and could furnish leads for further investigation. For example, knowledge of the identities of individuals and organizations providing funds could assist in answering questions as to whether any of appellants' funding comes from foreign sources, or from known subversive organizations and individuals."

This later testimony completely negatives the implications from the court's statement in its original order that "moreover, several contributors are said to have remained anonymous even from the USSF officials; manifest disclosure of bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity." However justified this statement may have been in June, 1970, it is totally unsupported by the record at the trial on the merits. Futhermore, as just pointed out above, the government's brief points to the means by which the identity of anonymous donors could be ascertained even though their names might actually not be known to the officers of the USSF:

> "The information sought to be subpoenaed herein consists of the bank records relating to appellant organization. Those records may shed considerable light on various pertinent questions *and could furnish leads for further investigations.*" (emphasis added).

Can it be doubted that if the bank's records show receipt of a contribution from a brokerage firm (as witnesses testified some were received) further investigation of the brokerage firm would disclose the identity of the person whose account was charged with the corresponding amount? The same of course could follow from tracing of a cashier's check or the tracing of a check from a named foundation whose name did not identify the individual who controlled the foundation.

The trial court simply failed to make any findings of fact following the extensive testimony at the hearing on the merits. It follows, of course, that the court made no "appraisal thereof" in any manner that would carry out the clear mandate of this court, supra.

The showing made by the plaintiffs clearly meets the standards found to exist in those cases in which the Supreme Court has determined that the First Amendment was violated.

See NAACP v. Alabama, supra, and other cases cited. Nor is it significant that what is subpoenaed here is bank records rather than membership lists. See Pollard v. Roberts, supra, in which the Supreme Court affirmed the judgment of the three-judge district court in Arkansas holding that the equitable powers of the court should intervene when a local prosecutor sought to obtain the financial records of the Arkansas Republican Party, even though the prosecutor was acting in connection with the proper effort to investigate charges of criminal violations of the Arkansas statutes as to the expenditure of funds.

It is true that the cited cases came to the Supreme Court as a result of state action usually resulting in punishment for contempt for failure of the organization to produce its own records (the exception being Powell v. Roberts, *supra*). We think this is not a distinguishing factor, since the standard used in deciding whether to vindicate the guarantee of free speech and assembly must be the same when the contest is between the individual and a state legislature as it is between an individual and the United States Congress.

It is abundantly clear from this record that USSF and the coffee houses and G.I. newspapers it supported were "controversial" organizations in the same sense as were the N.A.A.C.P. and the Republican Party of Arkansas in the early 60's.

We conclude, therefore, that the rights of the plaintiffs here are of the same quality that the courts have long undertaken to protect.

As we have indicated above the appellants claim that the subpoena was defective because of the lack of specifity or the showing of a nexus between the purpose of the original Senate Resolution authorizing investigations of this general nature and the USSF and of the Sub-Committee resolution. It is true that the Sub-Committee resolution of March 11, 1970,

did not recite any basis for the investigation of USSF other than that "information collected pursuant to the Sub-Committee's resolution of October 14, 1967 [authorizing the investigation of the National Conference for New Politics] makes a prima facie showing that the organizations [of which USSF was one] and individuals hereinafter named should be subject to further investigation." There may thus be a substantial question if properly and timely raised whether the resolution authorizing the subpoena gave adequate notice of pertinency to the subject of investigation to withstand attack. In re: Chapman 166 U.S. 661. While heretofore the courts have only required such a showing to be made when a recalcitrant witness, threatened with prosecution for contempt, insists that the same notice be made as is required in a criminal prosecution by indictment or information, we pretermit altogether the question whether or not a similar showing must be made where there is not contempt prosecution at hand. Moreover, since it is clear that the government's opposition to the relief sought here is primarily based upon the immunity of a co-equal branch of the government from court interference, we could not avoid resolving the issue of Senatorial immunity *even if* we were to decide that the USSF is in a position to challenge the specificity of the authorization of the subpoena *and* that the subpoena was invalid for want of specificity.

PARTIES AND REMEDY

Following the denial of the preliminary injunction and prior to the hearing on the merits, the trial court dismissed the Senator defendants from the suit, concluding "that said defendants are personally immune from suit," citing Dombrowski v. Eastland, 387 U.S. 82 (1967).

As we have previously noted appellants have not been able to cite any case, by the Supreme Court, or by Courts of

Appeal, in which it has been held that named committee members of the Congress may be made the subject of a judgment of the court. However, in discussing the question of justiciability we called attention to the language of the Supreme Court opinion in the Gravel case, which when taken in light of existence of the remedy of declaratory judgment, strongly points to the conclusion that, if finally necessary to vindicate a constitutional right, Members may be responsive to court proceedings. We quote again the pertinent language:

> ". . . . On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, *in order to secure information for a hearing, themselves* seized the property or *invaded the privacy of a citizen*. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." (Emphasis added). 408 U.S. 606, 621.

The scope of the immunity of Members for actions within the legislative sphere has now been particularized in Doe v. McMillan, *supra*, decided since this case was submitted. It is now clear that there is no relaxation of the immunity of a Member for participating in the debate of, or action in relation to, a measure in Congress merely because the objective of the action may be unconstitutional. The court said:

> "Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative context, would in itself be unconstitutional . . . " Doe, *supra*, at 4754.

The court thus sharpens the distinction between the "legislative sphere" and the non-legislative acts carried out either by Members or others.

> "Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, Kilbourn v. Thompson, *supra*, but the Speech or Debate Clause no more insulates legislative functionaries carrying out such non-legislative directives than it protected the Sergeant at Arms in Kilbourn v. Thompson, when at the direction of the House he made an arrest that the courts subsequently found to be 'without authority.' Id. at 200. [Footnote omitted]. See also Powell v. McCormack, 395 U.S. at 504; cf. Dombrowski v. Eastland, 387 U.S. 82 (1967). The Clause does not protect 'criminal conduct threatening the security or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction."

Footnote 9 in the above quoted text clearly deals, it seems to us, with the question before us by quoting language from Grave, *supra*, analyzing the Kilbourn case:

> "That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest," citing Gravel v. U.S., 408 U.S. at 618.

Here, we have concluded that the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs. Such a determination seems well within the intendment of the language of the court in Gravel, already quoted above, that Members of Congress would have no immunity if they, "in order to secure information for a hearing, themselves . . . invaded the privacy of a citizen," Gravel, *supra*, 621.

Such a determination as this can, of course, be made only in connection with a "case or controversy," which, in turn, exists only if there are adversary parties. The trial court, not distinguishing between the actions within the "legislative

sphere" which are immune and those beyond, which are not, left no opportunity to the parties to develop a record upon which the court could draw the line between what was privileged and what was not. The court dismissed the complaint against the Senator defendants without drawing such a line.

The trial court also sustained the refusal of defendant Sourwine, the committee counsel, to answer any question at his deposition hearing except such as related to facts already disclosed by public record. The plaintiffs were therefore precluded from obtaining information from committee counsel as to the actions of staff members of the committee which may well have thrown light upon the identities of those persons who, under our concept of the case, would stand in the shoes of Mr. Thompson, the Sergeant at Arms of the House of Representatives in that famous case.

We conclude, therefore, that the trial court erred in dismissing the Senator defendants at the then stage of the proceedings. In light, also, of the line of demarcation, which we think the court has drawn between "legislative" protected acts and non-legislative non-protected conduct, which may properly be inquired into by the courts, the trial court should consider the extent to which committee counsel should properly be required to give evidence as to matters without the "legislative sphere." We further conclude that if, upon further consideration of the actions of individual members of the staff, the trial court should conclude that the case can better proceed to a decision on the validity of the subpoena by the addition of other parties. The court should be liberal in granting the right of amendment to the plaintiffs for that purpose.

We do not, of course, intimate that the court should lightly include a Senator or Member of the House of Representatives as a defendant in litigation of the kind with which we are here concerned except under unique circumstances—circumstances, which may or may not develop in this litigation, that demonstrate that such Member's presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed. Moreover, the fact that we conclude that it is appropriate in this case to reinstate the Senator defendants does not, of course, mean that it is necessary for the court, in order to grant relief, to enter any coercive order. The jurisprudence clearly indicates, it seems to us, that where relief can be adequately granted in a suit against a Member of the Congress or a Member of the Executive Department by a declaratory judgment, such procedure is preferable. In Powell v. McCormack, *supra*, 395 U.S. at 517, in discussing the question of justiciability, the court said:

> "We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief that the District Court could have issued. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may 'declare the rights . . . of any interested party . . . whether or not further relief is or could be sought.' The availability of declaratory relief depends on whether there is a live dispute between the parties, Golden v. Zwickler, 394 U.S. 103 (1969), and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. See United Public Workers v. Mitchell, 330 U.S. 75, 93 (1947); 6A J. Moore, Federal Practice ¶ 57.08 [3] (2d ed. 1966); cf. United States v. California, 332 U.S. 19, 25-26 (1947). We thus conclude that in terms of general criteria of justiciability, this case is justiciable."

It is not doubted that such a declaratory judgment will adequately protect the rights of the plaintiffs. Again, in Powell v. McCormack, at page 499, the court pointed to the effectiveness of a declaratory judgment.

The judgment of the trial court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

MACKINNON, *Circuit Judge*, dissenting: In my view the majority opinion does not face up to the facts or to the legal principles that make the subject subpoena a valid exercise of the investigative power by the United States Senate. I thus respectfully record the following dissent.

The United States Servicemen's Fund

The United States Servicemen's Fund (USSF) was incorporated in Delaware as a nonprofit membership corporation on January 6, 1969 and was granted an exemption from the payment of federal income taxes by the U. S. Internal Revenue Service in March 1969 (A. 147, 135). Its certificate of incorporation sets forth a number of charitable and educational purposes.[1]

Allegedly in the exercise of these corporate powers the USSF, among other activities, established a number of so-called "coffee houses" near and on about 17 large federal military installations (A. 119, 148, 152) and also furnished financial assistance to about 75 newspapers which were distributed on federal military bases around the world (A. 120, 150).

---

[1] 1) To stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:

2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;

3) Excuting, sponsoring and encouraging research designed to improve the general welfare of military personnel;

4) Contributing to the costs of legal representation of military personnel;

5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;

6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life. (A. 2)

In engaging in these activities the USSF contended that the activities of these coffee houses and newspapers were needed by men in the U. S. military services because such men "are in effect, inmates of a totalitarian institution" (A. 122-23) similar to "prisons, convents, boarding schools [and] mental hospitals" (A. 125) and need the "education"[2] available through the USSF coffee houses and USSF supported newspapers for their "psychological well being" (A. 128). As used by the USSF the term "education" was not used in its ordinary sense of personal development but rather referred to efforts to convert military personnel into opponents of the Vietnam War. This is clear from the description given at trial by Mr. Gutman, their counsel, of the type of "education" provided by the USSF:

> The Servicemen's Fund indeed does educate a great deal on the issues which most concern servicemen, which, of course, is the war, and the library, educational material and discussions which are carried on through the publication and meeting facilities and the library of the servicemen do indeed deal to a large extent with issues of the war, legality, the morality, the practicality and so on of the war, and the immediate issue most concern the men who are fighting and being trained to fight it. (A. 221)

Through its activities the USSF stated that it sought to bring about the "immunization" of soldiers "against the assaults of the military posts" and other "total institutions" so that they would "associate with those people of like views . . . [and] develop [a] system of counter mores . . . and a sense of personal identity or autonomy with the group of people that sits outside the total institution" (A. 125, 130). When we translate the foregoing into plain English, the USSF admits

[2] "[T]he thing which conerns us most is [one of] the war in Vietnam . . . ." Testimony of USSF expert witness Dale Edwin Noyd of Richmond, Indiana, an Assistant Professor of Psychology at Earlin College (A. 53, 150).

that it was seeking through its coffee houses and the newspapers it supported to convert military personnel into opposing the United States military operations in Vietnam (A. 150, 221) and in actual practice that is what the record indicates it was attempting to do.

Such activities brought complaints against the coffee houses and some of the personnel associated with acts which resulted from USSF supported activity. While the record at trial was not required to go extensively into such matters there was testimony indicating that the USSF coffee house at Ft. Dix was attacked by rocks, projectiles, hand grenades and several gunshots (A. 153); that the staff members of its South Carolina coffee house had been convicted of operating a common nuisance and the house padlocked (A. 153); and that one individual activist who was participating in USSF funded activities "was a bad influence around trainees, and that he was bad for the morale and discipline among the troops" (A. 110, 169-180).[3]

From a reading of the entire record it is apparent that in numerous instances, the methods the USSF elected to follow in carrying out its opposition to the United States military operations in Southeast Asia were calculated to attack the morale of service personnel and were intended to be disruptive of the then current mission of the United States military establishment in Southeast Asia as directed by national policy established jointly by the Presidents and Congresses since the 1960's. Such activities could not help but create a reasonable cause for concern.[4]

[3] The resort to force to counter the disruptive activities of the USSF, while highly improper, is an indication as to how seriously many view some of the USSF activities.

[4] United States v. Barksy, 83 U.S.App.D.C. 127, 132, 167 F.2d 241, 246 (1948), *cert. denied*, 334 U.S. 846, *rehearing denied* 339 U.S. 971.

The Investigation by the Subcommittee

Faced with such disruptive activities by the USSF directed at the morale of the armed services carrying out duly declared national policy,[5] the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate decided to investigate. In S. Res. 341, the 91st Congress had previously authorized such Subcommittee

> to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.[6]

---

[5] *Mitchell v. Richardson*, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 71-1510, March 20, 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971), *aff'g 327* F. Supp. 378 (D.Mass. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970); United States v. Sisson, 294 F. Supp. 511 (D.Mass. 1968).

[6] S. Res. 341, 91st Congress, in its entirety provides:

S. Res. 341

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized under sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisidiction specified by rule XXV of the Standing Rules of the Senate insofar as they relate to the authority of the committee to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as *amended*; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

Sec. 2. For the purposes of this resolution, the committee, from February 1, 1970, to January 31, 1971, inclusive, is authorized (1) to make such expenditures as it seems advisable; (2) to employ upon a temporary basis technical, clerical, and other assistants and consultants: *Provided*, That the minority is authorized to select one person for appointment and the person so selected shall be appointed and his compensation shall be so fixed that his gross rate shall not be less by more than $2,700 than the highest gross rate paid to any other employee; and (3) with the prior consent of the heads of the departments or agencies concerned, and the Committee on Rules and Administration to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

Sec. 3. Expenses of the committee under this resolution, which shall not exceed $555,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

Acting pursuant to such authority the Subcommittee duly adopted resolutions to subpoena certain information relevant to the activities of the USSF. The Subcommittee resolution provided:

> WHEREAS, information collected pursuant to the Subcommittee's resolution of October 14, 1967 makes a *prima facie* showing that the organizations and individuals hereinafter named should be the subject of further investigation, it is directed that such investigation be carried forward by the staff; and that when the Chairman shall conclude that the results of staff investigation with respect to any such person or organization indicate the desirability of a hearing or hearings, the Chairman is authorized to issue appropriate subpoenas, including

subpoenas *duces tecum*, to insure attendance of necessary witnesses and the production, if required, of material evidence.

* * * * * * *

The foregoing applies with respect to: United [States] Servicemen's Fund, Inc. (A. 64-65)[7]

Thus, it came to be that on May 28, 1970 the Subcommittee issued a subpoena to the Chemical Bank in New York City, over the signature of Senator James O. Eastland, Chairman of the Committee on the Judiciary and the Subcommittee on Internal Security. The text of the subpoena provided:

UNITED STATES OF AMERICA
Congress of the United States

To Chemical Bank
20 Pine Street
New York, N.Y., Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to furnish to the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Thursday, June 4, 1970, at 10:00 o'clock a.m., at their committee room 2300, New Senate Office Bldg., Washington, D. C. 20510, pursuant to S. Res. 366, 81st Congress-2d, as amended and extended, and S. Res. 341 agreed to February 16, 1970, any and all records appertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce.

[7] The original resolution was adopted on May 11, 1970. It referred to the "United *[sic]* Servicemen's Fund, Inc." On May 15, 1970 the resolution was amended to refer to the "United *States* Servicemen's Fund" (Emphasis added) (A. 66).

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Any U. S. Marshal to serve and return.

Given under my hand, by order of the committee, this 28th day of May, in the year of our Lord one thousand nine hundred and seventy.

/s/ JAMES O. EASTLAND, U.S.S.
Chairman, Committee on the Judiciary
and the Subcommittee on Internal
Security

The obvious objective in issuing this subpoena to the bank which carried the USSF deposit (A. 199) was to obtain information as to the finances of the USSF and as to who was financially supporting it in its activities. Is this a legitimate subject of inquiry by the Subcommittee? Appellants contend that it is not for various reasons. The only reason that is now important is their claim that compliance with such subpoena would interfere with their right under the First Amendment of the Constitution to freedom of association. In this respect they contend that publishing the names of their contributors by giving them to the congressional committee "could have a devastating effect on fund raising of any organization" (A. 212). At trial, there was testimony that financial contributions to the USSF did fall off for this reason. However, the testimony does not negate that they may well have fallen off because the true nature of some of the activities of USSF were disclosed. Basically the claim is made that the contributions fell off because resulting publicity was not desired by a great many of their financial contributors. Some of these contributors are in themselves "foundations" and these organizations, and the individuals who use them for such purposes, fear that disclosure of their

contributions to USSF "might be damaging to their tax position" (A. 208) under the Internal Revenue laws (A. 201). Some of the contributors are tax exempt corporations (A. 197), as is the USSF (A. 147).

Testimony indicated that some of the contributors use various means to conceal their identity as contributors, including the use of corporations, foundations and other entities (A. 194, 195, 209, 217) and the making of contributions in cash, cashiers checks (A. 195), cashiers checks with no names (A. 217), checks from brokerage houses (A. 196, 217) and through the use of funds that do not bear the family name of the contributor (A. 199). Such surreptitious methods to conceal the identity of the donors are used by "major contributors" (A. 199) and, in one other instance testified to, the contribution was "a large check . . . a substantial contribution" (A. 200). One fund raiser for the USSF testified that he received a "substantial contribution" in the form of a "bank check" that he could not trace (A. 200). Another fund raiser testified that in the last year or so she had never known "so many large contributions [to be] given anonymously" (A. 216). Whether all this evidence related to USSF contributors is not clear, but the evidence was offered in support of their claim so apparently similar instances occurred in their fund raising. So it appears that there is a strong possibility that the USSF received substantial contributions to support its activities from sources unknown even to it. These sources, as well as those sources who make their contributions without any effort at concealment, might be uncovered if this investigation is allowed to continue (A. 200).

NAACP v. Alabama and Other Decisions

The USSF contends, and the majority opinion supports such contention, that the Senate investigation of its activities

through the subject subpoena should not be allowed to continue because such action would unconstitutionally deprive the USSF of its First Amendment right to freedom of association. The majority opinion states the issue to be whether the courts of the United States have power to interfere with a congressional subpoena "when the exercise of such power threatens a deprivation of First Amendment rights of freedom of association which can be vindicated in no other way than by court decree" (Majority opinion, p.2). Having so stated the issue it concludes that the courts do not possess such power. In reaching such conclusion, without analysis, it relies upon five decisions: *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1963); and *Pollard* v. *Roberts*, 393 U.S. 14 (1968), affirming the judgment of the three-judge District Court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968).

The basis of the majority opinion is its assertion that the five cited decisions, *supra*, uphold the right of voluntary associations especially those "engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose . . . ." However, I find the five cases to be distinguishable on their facts and on grounds that justify a finding that the facts here present a "compelling . . . federal purpose." In my view when the majority opinion cites these five cases in a conclusory way it does not come to grips with the basic facts or the principles of law announced by the Supreme Court that must control the decision here.

In *NAACP* v. *Alabama*, *supra*, the Supreme Court held that the State of Alabama in its attempt to obtain the local NAACP membership lists in Alabama as part of the attempt

by the state to enjoin the NAACP further in, and to oust the organization from, the state had failed to show a controlling justification for the deterrent effect that such disclosure would have on the right of its members to associate. The subpoena that sought to compel such disclosure was a state court subpoena, no issue involving the separation of powers, federal or state, was presented and the right of association was being exercised in support of racial rights guaranteed by the Constitution which sufficiently overcame whatever interest the state had in obtaining the names of the NAACP's ordinary members.

Bates v. *Little Rock, supra,* held that two occupational license tax ordinances which required local branches of the NAACP to furnish the city officials with lists of the names of the members of the local branches of the association violated the members' right to freedom of association. The Court (Stewart, J.) recognized that the proper and efficient exercise of the power to tax may sometimes entail the possibility of encroachment upon individual freedom but it was unable to find any "relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the [local NAACP] membership lists . . . ." 361 U.S. at 524-25. This decision involving a local taxing ordinance is a far cry from the factual situation which confronts us, holding, as it does, merely that the evidence sought was not relevant.

The third decision relied upon by the majority opinion is *Louisiana ex rel. Gremillion* v. *NAACP, supra,* which in 1961 affirmed a three-judge court decision in Louisiana rendered in a declaratory judgment action brought by the NAACP. It held that a Louisiana statute which required "fraternal . . . charitable . . . [and] social organizations" to file annually with the Secretary of the State a complete list of all local members and officers violated the members' of the NAACP their constitutional rights to freedom of association as

guaranteed by the First Amendment. Some local affiliates in Louisiana of the NAACP had filed membership lists and thereafter some of its members were subjected to economic reprisals. The case stands for the principle that a state statute directed at "non-trading" corporations cannot constitutionally be applied to associations organized to further the civil rights of Negroes where the required disclosure of membership lists results in subjecting the members to economic reprisals. No question involving the separation of powers was involved and no issue was present as to the legislative right to investigate. The case is merely another extension of the recognized protection that the Constitution gives to Negro rights.

In 1963 the Supreme Court by a 5 to 4 vote decided *Gibson* v. *Florida Legislative Committee, supra.* The majority opinion was written by Justice Goldberg and dissenting opinions were filed by Justices Harlan and White. The majority held that it was a violation of the right of freedom of association to convict the president of the NAACP chapter in Miami, Florida, for contempt of a state legislative investigating committee when he refused to testify whether any of 52 or 14 named persons given to him were members of the Miami chapter of the NAACP. The committee had previously developed information that these persons had some relation to Communist activity, and the NAACP, by resolution, had previously recognized that certain branches of the NAACP were "being rocked by internal conflicts between groups who follow the Communist line and those who do not . . . [and] that there is a well-organized, nation-wide conspiracy by Communists either to capture or split or wreck the NAACP . . . ." The local president was asked by the legislative committee to testify from memory or, after refreshing his recollection, from the membership list. He refused to testify on either basis notwithstanding that the committee made it clear that they were not requiring a disclosure of the membership list.

The majority opinion was based upon its assertion that the state had not shown convincingly a substantial relation between the information sought and a subject of overriding and compelling state interest. The basis of the decision, being thus grounded on a finding of irrelevance is distinguishable from the facts here as it will hereafter be demonstrated that there is a direct compelling federal interest in subject inquiry. Moreover, a close reading of the majority and dissenting opinions convinces that the dissents by Justice Harlan and White assert the sounder law on the other points. The legislative committee obviously had a proper basis to ask the questions it did and it could not be required to prove in advance the very things it was attempting to determine. If the Senate could already prove such facts there would be no need for the subpoena. And how any intereference with the right to freedom of association is involved is not apparent. It seems clear to me that this decision will not be followed in subsequent cases, and in any event is not applicable here because of the existence here of a compelling Federal interest.

The last decision relied upon by the majority opinion is the three-judge district court decision in Arkansas, 283 F. Supp. 248 (1968) which was affirmed Per Curiam by the Supreme Court without opinion in *Pollard* v. *Roberts, supra.* (Justice Black was the opinion that probable jurisdiction should be noted.) In that litigation a state prosecuting attorney in Arkansas was enjoined on First Amendment grounds from subpoenaing the bank records of the Republican Party in the state, because the prosecutor "was required to make a far greater showing of relevancy and public interest in the disclosure than has been made here." 283 F. Supp. at 258. Here again the information demanded was found to be irrelevant. Underlying the decision was the common sense rationale that the list of financial contributors was not relevant to the charge of illegal vote buying that the

prosecutor was allegedly investigating.[8] The decision does not hold that a state may never require campaign contributions to be made public but merely refuses to do so "where the demand has no more substantial basis than the one involved in this case," 283 F. Supp. at 259. In fact the decision went on to hold that it was only the disclosure of "contributions" and not "expenditures" that was being enjoined,[9] and that if the prosecutor finds himself in a position to make a showing that would entitle him to see records of contributions of certain individuals that he could apply to the court to modify the injunction. 283 F. Supp. at 259. So the case merely holds that the prosecutor had not made a showing that the requested disclosure was relevant to his inquiry and is not authority for the proposition that lists of contributors can never be required.

All these cases are distinguishable from the instant case on the ground that none of them on their facts makes a showing that the lists were requested for a proper purpose.[10] Some are also distinguishable on the additional factual

---

[8] The Party had already disclosed all checks that it had drawn in favor of persons residing within the prosecutor's judicial district. 283 F. Supp. at 259 Thus there had been complete disclosure of "expenditures", which without further showing, was the only relevant inquiry.

[9] Some "checks indicated that they were drawn in payment for campaign services such as knocking on doors, ringing doorbells, and other activities to 'get out the vote' for Republican candidates." Pollard v. Roberts, 283 F. Supp. at 252. Such legitimate campaign activities are no proof of illegal vote buying.

[10] The right of a racial minority to be protected against oppressive conduct by government because of their attempts to protect their guaranteed civil rights weighs more heavily against governmental activity than does the right of a group to be protected against activity by government to investigate what appears to be subversive activities so as

variances pointed out above. Only one of the cases involved a legislative subpoena (state legislature) and that case was decided on the grounds that the subpoena sought irrelevant information, *i.e.*, that there was no adequate showing of a substantial relation between the information sought and a subject of compelling state interest. In the instant case, however, as is pointed out *infra*, there is a demonstrable relationship between the information sought and the valid legislative interest of the federal Congress. It is also significant that the majority opinion does not come to grips with *Barenblatt* v. *United States*, 360 U.S. 109 (1959), or *Uphaus* v. *Wyman*, 360 U.S. 72 (1959). These two cases were decided on the same day and they deal directly with the issues which are here presented.

---

to determine legislative policy with respect to the desirability of continuing existing statutes regulating their activity and authorizing tax exemptions for organizations so engaged. Four out of the five cited cases have strong racial overtones and related to states which, while great progress has been made in this respect in recent years, were still states where racial discrimination has been a recognized national problem. The cases with regard to Alabama and Louisiana involved states where the effect of prior suppression was such that the Attorney General determined that as late as November 1, 1964 local conditions were such that they were required to clear changes in local voting procedures in accordance with section 5 of the Voting Rights Act of 1965, as amended, 30 FED. REG. 9897, Aug. 7, 1965; 79 Stat. 439, 42 U.S.C. §§ 1973b(b), 1973c; *cf.* Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972); Perkins v. Matthews, 400 U.S. 379 (1971). This determination, involving these well recognized local situations with respect to racial matters when coupled with the objectives sought to be accomplished by the Government in these four cases, were factors that the Supreme Court would not be oblivious to in their decision. Each of these four cases is thus also distinghishable on this basis from the facts in this case.

Balancing the Competing Interests

It is apparent from the facts here that the Senate Committee was attempting to determine the names of some of the individuals and foundations that were financing the USSF. As the majority opinion notes, quoting the Subcommittee's brief:

> [K]nowledge of the identities of individuals and organizations providing funds could assist in answering questions as to whether any of appellants' questions as to whether any of the appellants' funding comes from *foreign sources*, or from known *subversive organizations or individuals*. *Supra* pp. 33-34.

The Subcommittee and the Congress have a valid legislative interest in ascertaining whether any of the money used to finance any questionable activities of the USSF came from foreign sources or subversive organizations. The activities of coffee houses and newspapers supported by the USSF were designed to, and could not possibly have failed to some extent "to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States."[11] Such activities might have caused or attempted to cause insubordination, disloyalty, or refusal of duty, and as such would have constituted violations of 18 U.S.C. § 2387(a) which provides:

> § 2387. Activites affecting armed forces generally
>
> (a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:
>
> (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
>
> (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges

---

[11] General Douglas MacArthur once remarked, "In war morale is to the physical as four to one." Thus, to the extent that the USSF was striking at the morale of the troops it was striking at the jugular.

> insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If some of the contributors to the USSF were from "foreign principals," there was a definite congressional interest in determining whether the Foreign Agents Registration Act had been complied with. 22 U.S.C. § 611 *et seq.* Compliance with the Internal Security Act, 50 U.S.C. § 781 *et seq.*, as the enabling resolution stated, was also a legitimate objective of the investigation by the Subcommittee. In addition, the subject matter of these statutes was also a legitimate subject of congressional inquiry in order to determine whether these laws should be retained, repealed or amended to meet new conditions, or whether new laws were needed. It would also be a permissible goal of the investigation to determine whether any of the contributors has been mislead by the use of the name "United States" in the name of the organization into believing that the USSF was sponsored or approved by the Government of the United States or by the United States Military services or any other United States department or agency. *Cf.* 18 U.S.C. § 713.

The condition and efficiency of the military is a matter of vital concern to Congress, particularly when large scale foreign military operations, such as were under way in 1970, were being undertaken. This concern arises by virtue of the constitutional grant of power to Congress:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONST. art I, § 1.

• • • • •

> The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .
>
> • • • • •
>
> To raise and support Armies . . . .
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulations of the land and naval Forces;
>
> To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> • • • • •
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

Congress' interest in the military, including its morale, is of long standing. In fact, the very first investigating committee ever established by Congress was directed to inquire "into the causes of the failure of the late [military] expedition under Major General St. Clair." The committee was empowered to "call for such persons, papers and records as may be necessary to assist their inquiries." March 27, 1792, 3 ANN. CONG. 394. It investigated matters relating to the morale of the military personnel involved, as is obvious from the committee report, which referred to desertions and discontent, 3 ANN. CONG. 1110, 1111, and found "the want of discipline . . . in the troops." 3 ANN. CONG. 1111.

Numerous subsequent investigations by Congress into military affairs are too well known to need citation. No elaborate authorities, likewise, need be recited for the principle that Congress has power to investigate any subject upon which it might legislate.[12] Thus the authority of Congress to make subject investigation is unquestioned. The only substantial issue that remains is whether the Subcommittee as an arm of the Congress can compel the production of the evidence of appellants' contributors.

That the Senate Subcommittee has authority to compel the production of such evidence is fully supported by the Supreme Court's 6 to 3 opinion in *Barenblatt* v. *United States, supra,* and its decision in *Uphaus* v. *Wyman, supra.* In *Barenblatt* the majority opinion, written by Justice Harlan, sets forth the precise principles that should control in the situation here presented. In that case the House Un-American Activities Committee was investigating Communist infiltration into the field of education and it sought corroboration from Barenblatt (a psychology instructor at Michigan and subsequently at Vassar) that he had been a Communist while he was a graduate and teaching fellow at Michigan during 1947 to 1950. Barenblatt objected to the Committee investigating his political and religious beliefs or into "any other personal and private affairs" or "associated activities" on the claim that he was privileged not to answer them by the constitutional guarantees of free speech and against self-incrimination of the First and Fifth Amendments. His claims were denied by the Committee and when he persisted in his refusal on such grounds he was tried and convicted of contempt of Congress. This conviction was ultimately upheld by the Supreme Court and it is principally with the Court's disposal of his First Amendment claims that we are here concerned. This holding is of controlling importance here

[12] Barksy v. United States, *supra*, 167 F.2d at 245.

because it is substantially the same claim that the USSF presently makes, but Barenblatt's claim was stronger because he was making a personal claim following a criminal conviction.

In disposing adversely of Barenblatt's appeal the Court held, on the point that is of importance here, that the First Amendment does not protect against disclosure of one's associational relationships in all circumstances:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

Barenblatt v. United States, supra, 360 U.S. at 126. The earlier opinion by Chief Justice Warren in *Watkins* v. *United States,* 354 U.S. 178 (1957), involving a similar issue, had provided for a similar weighing process:

> It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred .... The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.

Watkins v. United States, supra, 354 U.S. at 198.

So, in line with these authorities, what we must do here is to balance the competing private and public interests of the USSF and its contributors with those of the United States Government as represented by the powers and valid interests of the Subcommittee of the United States Senate. While the majority opinion refers to such balancing it does not indulge in it. When we do balance the competing interests we fail to find any factors which indicate that the individual interests of the USSF contributors are not subordinate to those of the Government as represented by the valid legislative interests of the Congress acting through the Senate Subcommittee. As

pointed out above the interests of the nation in the personnel of our armed services, and the security of the nation, when coupled with the express grants of constitutional power to Congress, set forth *supra*, clearly authorize Congress to investigate the subject matter presented by the activities of the USSF. We so held in *Barsky* v. *U.S.*, *supra*, stating:

> This existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation for its creators to preserve itself.
>
> 167 F.2d at 246.

In my view Congress not only has the right to investigate the activities of the USSF but it also has the duty to do so; and whether the threat is sufficient to constitute a "clear and present danger" is not controlling on the power of Congress. As we said in *Barsky:*

> We are referred to the "clear and present danger" rule expressed by Mr. Justice Holmes in Schenck v. United States and extending through the line of cases cited and discussed in Bridges v. State of California. But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of governmental policy for an existing government policy to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.
>
> 167 F.2d at 246-7.

As with the power to investigate Communist activity, the power of Congress to legislate in the field to which this subpoena is directed "rests in the last analysis on the nation's right to self preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States, supra,* 360 U.S. at 127-28. Certainly whether Congress would decide to continue to permit tax exempt funds to be used for such potentially subversive purposes is a proper subject for congressional inquiry, as are the additional subjects set forth *supra* at 40. Congress frequently prohibits even admittedly nonsubversive tax exempt organizations from making political contributions,[13] and federal law has long required the filing

---

[13] The federal statutes contain many provisions prohibiting certain tax exempt organizations from making political contributions, including the following: Agricultural Hall of Fame, 36 U.S.C. § 980; American Legion, 36 U.S.C. § 46; American War Mothers, 36 U.S.C. § 98; AMVETS, 36 U.S.C. § 67d; Big Brothers of America, 36 U.S.C. § 890; Blinded Veterans Association, 36 U.S.C. § 860; Blue Star Mothers of America, Inc. 36 U.S.C. § 950; Board for Fundamental Education, 36 U.S.C. § 510; Boys Clubs of America, 36 U.S.C. § 700; Congressional Medal of Honor Society of the United States of America, 36 U.S.C. § 800; Disabled American Veterans, 36 U.S.C. § 90f; Federal Employees, 5 U.S.C. §§ 7321, 7323; Foundation of the Federal Bar Assocation, 36 U.S.C. § 580; Future Farmers of America, 36 U.S.C. § 2280; Jewish War Veterans, U.S.A., National Memorial, Inc., 36 U.S.C. § 919; Ladies of the Grand Army of the Republic, 36 U.S.C. § 78i; Legion of Valor of the United States of America, Inc., 36 U.S.C. § 640; Military Order of the Purple Heart of the United States of America, 36 U.S.C. § 830; National Conference of State Societies, 36 U.S.C. § 411; National Conference on Citizenship, 36 U.S.C. § 440; National Fund for Medical Education, 36 U.S.C. § 610; National Music Council, 36 U.S.C. § 670; National Safety Council, 36 U.S.C. § 471; National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic, 36 U.S.C. § 1011; Naval Sea Cadet Corps, 36 U.S.C. § 1050; Reserve Officers Association, 36 U.S.C. § 230; Sons of Union Veterans of the Civil War, 36 U.S.C. § 541; United States Blind Veterans of the World War, 36 U.S.C. § 86; Veterans of World War I of the United States of America, 36 U.S.C. § 771.

with the Clerk of the House of Representatives of "the name and address of each person who has made a contribution to or for [any political committee, agregating] $100 or more . . . ."[14] If such admittedly legitimate associational aactivities can be prohibited or their disclosure compelled, *a fortiori*, there is no constitutional objection to requiring disclosure from organizations such as the USSF.

The subpoena here is also clearly directed to the disclosure of what to all intents and purposes appears to be relevant evidence on a subject the Committee was authorized to investigate and it was duly issued pursuant to proper authority and in my opinion is not overly broad. But appellants assert that their contributors have a right under the associational rights guaranteed by the First Amendment to remain anonymous, i.e., to conceal their identity. This is equivalent to saying that there is a constitutional right of secrecy as to one's public political activities. On such contention *Josephson* v. *United States*, 165 F.2d 82, 92 (2d Cir. 1948) holds to the contrary, and *Doe* v. *McMillan*, ___ U.S. ___ (May 29, 1973,42 USLW 4752, holds that one's right

[14] 2 U.S.C. § 244, and *see generally*, 2 U.S.C. § 241, *et seq.*, for regulation and disclosure of those associated in admittedly legitimate political activity. And it is not unknown for newpapers to be required to register the names of their owners and publishers in order to disclose to the public the names of those responsible for its statements. For example, *See* MINN. STAT. 331.03 (1967):

> 331.03 STATEMENT OF OWNERSHIP. Each newspaper printed or published within the state, excepting legally qualified newspapers, shall register in the office of the register of deeds a statement of the owners, printers, and publishers of the paper and the residence of each and, if the same shall be published by a corporation, the names and residences of the president, secretary, and editors thereof. The register of deeds shall provide a suitable book in which to register the names as herein provided, and charge therefor a fee of 50 cents.

of privacy (allegedly based on the First Amendment) does not protect against disclosure of the identity of students engaged in certain acts in public schools of the District of Columbia by a congressional committee report issued by a congressional committee to the extent that such disclosure was reasonably within the legislative sphere. There is no showing here that the information was not being sought for use in the legislative sphere. In addition, as Judge Prettyman remarked in *Barsky* v. *U.S.*, *supra*:

> If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject.
>
> 167 F.2d at 246.

The same is true here. The identity of the individual contributors and the names of the contributing foundations is central to the concern of the Congress and is part of the subject matter of the investigation. Thus, if Congress has power to investigate the USSF and other organizations engaged in activities of the same character, then they have authority to discover and if need be disclose the identity of the individuals and foundations who provide the financial support for such organizations. Since Congress has clear authority to legislate on the subject, I see no reason why they cannot investigate fully.

Coming then to the extent that the freedom of association may prevent disclosing the identity of contributors, which is the ultimate issue before us, we come back to the answer first given above, which is that, under the conditions present in the instant case, one's rights under the First Amendment are not absolute but must be subjected to a balancing test. In weighing these competing considerations we note it is an associational right that the USSF claims for its

contributors – a claimed right of freedom of association. I am unimpressed that there is any potential denial of that right here in so far as that right is conferred by the Constitution. In this respect my view concurs with Judge White's dissenting observation in *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 584 (1963) to the effect that true freedom of association would be "promoted, not hindered," by disclosing information as to those who were supporting the USSF financially.[15] Disclosure of the identity of contributors would be a guarantee of true freedom of assocation. What kind of freedom is it for the contributing public to not know the identity of those with whom they are associating? A person who does not know, and cannot learn the identity of his associates in a venture, is not truly free. He does not have sufficient information to make a free choice – his is a compelled choice – compelled partially by lack of vital information – a blind choice.

This is a vital point here, because, as the majority opinion admits, *even the USSF do not know who some of their substantial contributors are*. The existence of these secret donors, and the likelihood that they would be disclosed if the subpoena were enforced, convinces the majority that constitutional rights would thus be infringed. However, in my view this fact is fatal to appellants' First Amendment claims. Certainly they have no right to assert a constitutional claim that they can operate the kind of activity they are carrying out here, involving as it does active opposition to declared national policy within the armed services of the United States,

[15] I would have thought that the freedom on association which is and should be entitled to constitutional protection would be promoted, not hindered, by disclosure which permits members of an organization to know with whom they are associating and affords them the opportunity to make an intelligent choice as to whether certain of their associates who are Communists should be allowed to continue their membership.

White, J., dissenting, 372 U.S. at 584.

and be *completely unaware* of the true identity of some of their substantial contributors. The USSF admitted that it does not know the source of some of its substantial contributions. One can search the First Amendment in vain to find any support for the principle that it protects or compels ignorance in such matters. These unknown contributors, as well as some of the contributors known to them, could be agents of foreign principals, or subversive individuals, or the contributing corporations or foundations might be making contributions improperly. If the USSF is engaging in the type of activities here reported and does not know the source of some of its substantial contributions it is acting recklessly and it is time that some person in authority determine the sources and the sooner the better. I see no constitutional right to privacy or secrecy in such matters. The cases cited above are to the contrary. When the USSF stepped into the public area, in my opinion, they forfeited any right to secrecy. Their acts were then public not private – and Congress has a right to investigate them.

Uphaus v. Wyman, 360 U.S. 72 (1959), decided the same day as *Barenblatt* is to the same effect on facts which closely resemble the facts here. In that case a subpoena was issued by the Attorney General of New Hampshire, acting on behalf of the state legislature, under a resolution directing him to investigate violations of the state subversive activities act and to determine whether "subversive persons" were then in the state. The opinion by Justice Clark required the executive director of World Fellowship, Inc., a voluntary corporation maintaining a summer camp in New Hampshire, to produce the names of all persons who attended the camp in 1954 and 1955. In so holding, the court found that the nexus between the corporation, its summer camp and subversive activities which might threaten the security of the state justified the investigation. I find the same valid nexus here between the subversive activities implicit in the allegations of the

operations of the USSF and the threat to our security posed by its acts directed at the morale of the armed services, particularly so because some of those financing the questioned activities are unkown to the USSF. It is thus my opinion that the subpoena is valid and should be complied with immediately. I would thus find that appellants were not likely to succeed on the merits for a different reason than the trial court so found, and I would accordingly refuse to issue the requested injunction and the requested declaratory judgment. It may well be that the USSF has a right to continue their propaganda activities but the Congress likewise has a right to know who is doing it, because that may affect much of their existing and possible future legislation.

The foregoing conclusion also compels the findings that the subpoena was a valid exercise of legislative power conferred upon Congress by the first sentence of the Constitution[16] and that the separation of powers deprives the courts of any further jurisdiction in the matter. The majority opinion pays lip service to the constitutional doctrine of the separation of powers but then refuses to adhere to its tenets. I find the Court's action in this case in interfering with the powers incident to the legislative function of Congress to be a gross abuse of its judicial powers. Let us assume that when the contributions are traced one of the "substantial contributors" turns out to be a foreign principal or a known subversive organization, or that there are a number of such sources. Would any person question that the Courts were wrong to delay the committee investigation for four and possibly five years? Is that respecting the powers of Congress? What the Court should do is accord the same respect to the actions of the legislative arm that we expect our judicial acts

[16] The *U.S. Const.* provides in Art. I, § 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

to receive and that was clearly not done here. Clearly the damage from disclosure is far less than the damage that would result to the valid activities of Congress if it were prohibited from determining facts necessary for informed legislation in this field. Even if nothing subversive or improper is turned up, Congress should still be able to consider whether to continue a tax exemption policy for activities such as USSF. If the cost of this valid consideration by Congress of the activities here sought to be investigated is the destruction of some financial support to the USSF through disclosure of the identity of some of its contributors, or through the fear of such disclosure then in my view it is financial support that should not have been sought in the first place.

I also dissent from that portion of the majority opinion which directs the reinstatement of the action against the United States Senators. In doing so the majority admit their inability to "cite any case, by the Supreme Court, or by Courts of Appeals, in which it has been held that named committee members of Congress may be made the subject of a judgment in the court." To my mind it would have been more proper, instead of asserting a negative, to rely upon the recent affirmative holding of *Doe* v. *McMillan*, *supra*, that United States Senators when acting in the legislative sphere are immune from suit.[17] That they were acting here in the

[17] The majority opinion cites Doe v. McMillan, ___ U.S. ___, (May 29, 1972), 42 USLW 4752, for the proposition that publication of alleged defamatory literature by individuals who were not members of Congress, or on the congressional staff of the committee producing the report, is not protected action under the Speech or Debate Clause, but such is not the principal holding of the case and that portion of the *Doe* decision is not relevant to this case, because we do not here have any parties who are not either committee members or staff members. What is important here is that *Doe* squarely held, and the opinion was unanimous on this point, that members of Congress, members of the staff of the congressional committee, its consultant and investigator were *absolutely* immune under the Speech or Debate Clause when they were engaged in the legislative acts of compiling the committee report setting

legislative sphere is clear beyond doubt. I thus find that the action of the majority does interfere with "a textually demonstrable constitutional commitment of the issue to a coordinate political department [the Congress] [and that there is an] impossibility of [this court] . . . undertaking independent resolution [of the issue] without expressing lack of respect due coordinate branches of government . . . . " *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The majority opinion, however, decides that the "subpoena would invade constitutional rights" and in my opinion it does not since the Subcommittee was acting validly in the legislative sphere and secrecy of activities is not included within the constitutional guarantee to freedom of association. Also, there is no improper invasion of privacy here as public contributions were made by means of checks payable to an organization engaged in public activities and the nature of such public activities destroys any claim of privacy.

For all the foregoing reasons I would conclude that the balance between the individual and governmental interests here at stake must be struck in favor of the government and

---

forth voluminous facts and performing other legislative acts connected with such report. Thus, if *Doe* were followed, as it should be, Senator Eastland and the Senate Subcommittee staff (including Chief Counsel Sourwine) when they were gathering facts in the "legislative sphere" would be "absolutely immune" from judicial interference. Obviously members of Congress are not immune if the authorizing resolution is invalid or if it improperly "invade[s] the privacy of a citizen," but such is not this case.

that therefore the provisions of the First Amendment have not been offended. *Cf. Barenblatt* v. *United States*, *supra*, 360 U.S. at 134.[18]

---

[18] The trial court denied appellant's request for an order to compel the testimony of Sourwine, Chief Counsel of the Committee, and the majority opinion would vacate such denial in order that the trial court may reconsider this matter in light of the finding that the subpoena is invalid, void and unenforceable. The majority opinion thus does not determine whether the Senate validly exercised its privileges under the Separation of Powers Doctrine of the Constitution when it adopted S. Res. 478 on October 13, 1970, 116 Cong. Rec. 36481, authorizing the Chief Counsel of the Senate Subcommittee on Internal Security to testify in response to subject subpoena *but prohibiting him from testifying except as to matters which were "of public record." (A. 73-73).* The Resolution authorizes the Chief Counsel to give a deposition but provided, 116 Cong. Rec. 36481, certain limitations:

> "but [he] shall not testify respecting matters of which he obtained knowledge by virtue of his position and which are not matters of public record and shall not without further action by the Senate surrender any papers or documents on file in his office or under his control in his possession as Chief Counsel of the Senate Internal Security Subcommittee of the Committee on the Judiciary, Cong. Rec. October 13, 1970, S. Res. 478.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

Civil Action 1474-70

No. 24,279

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Before: WRIGHT, LEVENTHAL and MACKINNON, Circuit Judges, in Chambers.

ORDER

(Filed June 4, 1970)

This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

It appears, however, that serious constitutional questions are presented by this litigation which require more time than is presently available for proper consideration. *See Stamler* v. *Wills*, 7 Cir., 415 F.2d 1365 (1969). The Second Circuit has, in similar circumstances, involving the same appellees, issued a temporary restraining order in order to assure appropriate consideration by the federal courts in the District of Columbia. *Liberation News Service* v. *Eastland*, 2nd Cir., — F.2d — (No. 34,688, decided April 10, 1970).

In denying temporary relief, the District Court assumed the court entirely lacked jurisdiction. This assumption is doubtful indeed in view of the fact that parties defendant include the cognizant counsel of a committee and the pri-

vate party to whom plaintiffs have entrusted information. *Stamler* v. *Wills, supra; Hearst* v. *Black*, 66 App. D.C. 313, 87 F.2d 68 (1936).

It appears to the court that the issues involved, as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order.

The decisive element in our action to grant a stay is like that which moved the Second Circuit, because unless a stay is granted this case will be mooted, and there is likelihood that irreparable harm will be suffered by appellants, at 10:00 a.m. this morning.

It is Ordered by the court that the emergency stay requested by appellants be granted until the District Court has an opportunity fully to consider and to act on this matter, and it is

Further Ordered by the court that consideration of this case be expedited by the District Court.

Judge MacKinnon is of the opinion that the question is not free from doubt but would deny the stay on the record made before the trial court on the grounds that the subpoena was issued for a valid legislative purpose and that the balancing of the legislative power of Congress, including the ancillary power to investigate to determine what legislation may be necessary, against defendants' claimed First Amendment rights, leads to the conclusion that the balance prevails in favor of the governmental interests and that plaintiffs will not prevail on the merits. *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

Civil Action 1474-70

No. 24,412

United States Servicemen's Fund, et al.

v.

James O. Eastland, et al.

Before: Wright, Leventhal, and MacKinnon, Judges, in Chambers

ORDER

(Filed July 28, 1970)

This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

The stay granted by the Court on July 2, 1970, requires expeditious disposition of this case. Since the calendar for the September sitting of this Court has already been prepared and assigned, the case is hereby assigned to the October sitting. This will obviate the delay which would have been involved if the Clerk had followed the standard practice of including in the calendaring for the October sitting only those cases for which briefs had been filed prior to the date of preparation of the calendar.

It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d, 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler* 38 U.S.L.W. 3522 (June 30, 1972). It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits.

The final judgment of the District Court is likely to be appealed whichever way the court rules. By expedition of that appeal and consolidation with the instant appeal, it may be possible both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge.

Per Curiam

MacKinnon, Circuit Judge: I would refuse to grant a further stay and would affirm the District Court on the ground principally that appellants are not likely to succeed on the merits. For this reason, I also conclude that mooting the case will not cause them irreparable injury. Appellants are seeking to establish a privileged status not provided for by the law. Furthermore, the names of contributors to such activities is a matter of vital concern to Congress; and within its power to investigate, and it should not be further frustrated in its proper efforts to get on with its business of legislating with respect to the evils created thereby, if investigation confirms same.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1474-70

UNITED STATES SERVICEMEN'S FUND, ET AL., *Plaintiffs*,

v.

JAMES O. EASTLAND, ET AL., *Defendants*.

MEMORANDUM

I.

This matter is before the Court on plaintiffs' motion for preliminary injunction, and defendants' motion to dismiss the complaint. At a hearing on June 16-17, 1970, testimony was received on plaintiffs' motion for preliminary injunction, and argument was heard on the motion for injunction and defendants' motion to dismiss. Following the hearing, the respective parties submitted supplemental memoranda directed to argument received at the hearing on the respective motions.

Plaintiff contends it is a non-profit organization established for the purpose of furthering the welfare of persons in military service. It provides financial support to "G.I. coffeehouses" (gathering places near military bases where G.I.'s can gather and associate with other persons in and outside of the military), "G.I. newspapers" (newspapers published by and for persons in military service which raise issues of concern to them—including opposition to the war in Vietnam), and civilian legal defense for persons in the military. In addition, the Fund provided entertainment, books, newspapers, and library materials upon request. It is said the Fund exercises no editorial control over newspapers or other activities which it supports, and decisions to fund newspapers are in no respect influenced by the expected nature of the activity.

On April 16, 1970, the Senate Subcommittee on Internal Security (hereafter referred to as the Subcommittee) issued

a subpoena duces tecum to the Chemical Bank of New York City requiring the Bank to furnish the Subcommittee with all of the Bank's records relating to the account of the plaintiff. This subpoena was subsequently withdrawn by the Subcommittee because of an error in the precise name of the plaintiff organization in the Resolution authorizing the subpoena. A corrected subpoena was issued, but subsequently withdrawn upon the oral request of plaintiffs. A third subpoena, returnable on June 4, 1970, was then issued. It is this subpoena which plaintiffs challenge in this action.

On June 1, another Judge of this Court denied plaintiffs' motion for a temporary restraining order on the ground that the Court was without subject matter jurisdiction, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. On June 4, the Court of Appeals issued an Emergency Stay, finding "that the issues involved as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order." *United States Servicemen's Fund, et al.* v. *Eastland*, No. 24,279 (D.C. Cir. June 4, 1970).

Plaintiffs challenge the Subcommittee subpoenas on several grounds. First, they argue that investigation of their organization is not properly within the scope of the Subcommittee Resolution pursuant to which the subpoena was issued. In addition, they assert that there is no valid legislative purpose for the investigation of their organization under the Subcommittee's Charter Senate Resolution 341, and that this Charter Resolution is unduly broad and vague and therefore violates plaintiffs' rights under the First, Fourth, and Fifth Amendments. More specifically, plaintiffs allege that disclosure of their financial contributors which will result from execution of the subpoenas will deter private citizens and groups from supporting dissenting political views as is their constitutional prerogative.

II. Government's Motion to Dismiss.

Defendants have raised four separate arguments in support of their motion to dismiss. They argue: (1) That the defendants in this case are immune from suit; (2) That plaintiffs lack standing to object to the subpoena; (3) That plaintiffs' complaint raises a non-justiciable issue; and (4) That the complaint fails to state a claim upon which relief can be granted.

Defendants' first two grounds merit little discussion. There seems little question that jurisdiction over the person of the Subcommittee counsel defendant Sourwine is present, *Powell* v. *McCormack*, 395 U.S. 486 (1969). Moreover, plaintiffs are the proper parties to raise objections to the subpoenas at issue here, inasmuch as they are the express subject of the investigation. They have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). Plaintiffs are not required to entrust the task of protecting their First Amendment rights to a third party (the Bank) which has little interest in doing so. See *McSurely* v. *McClellan*, No. 23,845 (D.C. Cir. March 26, 1970), Slip Opinion at 8; *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918).

A more serious question is presented by defendants' contention that the complaint does not present a justiciable issue. The Supreme Court only recently restated the criteria governing whether a claim is justiciable. In *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court stated that justiciability encompasses two important considerations. First, the Court must determine whether the issue constitutes a political question. Second, the claim presented and the relief sought must admit of judicial relief.

In *Powell* the Supreme Court concluded that petitioner's challenge to the action of the House of Representatives in excluding him from membership despite the fact that he

had been duly elected was not a political question because the power to determine one's qualifications for the House is not "textually committed" to the House of Representatives by the Constitution, and because the Court's determination of the right of Powell to sit required no more than an interpretation of the Constitution of the type in which Courts ordinarily engage. The Court was not engaging in an "initial policy determination of a kind clearly for nonjudicial discretion." In the Court's opinion the same is true of the issues raised in this case.

The more fundamental question in this case is raised under the requirement that the issue admit of judicial relief. In *Powell* the House of Representatives argued that the Court was without power to issue injunctions compelling officers or employees of the House to perform specific official acts. The Court, however, did not have to reach that question. 395 U.S. at 516. In the instant case, however, the power of the Court to issue injunctive relief against a congressional body is squarely presented. Defendants correctly point out that lower federal courts have almost universally felt that "legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936). Thus, courts have consistently refused to restrain anticipatorily congressional bodies from pursuing proposed investigations and, similarly, have been reluctant to order committees of Congress to take any kind of affirmative action. *Pauling* v. *Eastland*, 288 F.2d 126 (D.C. Cir. 1960); *Mins* v. *McCarthy*, 209 F.2d 307 (D.C. Cir. 1953). This practice of restraint was but a manifestation of the respect to be accorded a coordinate branch of government under the doctrine of separation of powers.

Courts did not, however, refrain completely from review of use of the investigative powers of congressional bodies. It is undisputed that courts may, in the context of a criminal prosecution for contempt of Congress, rule on the constitutional propriety of the investigation from which the

charges of contempt arose. The distinction between review in the context of a contempt proceeding and anticipatory restraint of a committee investigation is readily apparent. In the normal situation involving a congressional subpoena, there is little need for a court to grant injunctive relief, for the person or organization to whom the subpoena is directed may avoid the injury which will allegedly be sustained by refusing to respond, and thereafter any objections to the validity of the subpoena may be raised by way of defense to a contempt proceeding, if any is instituted. A federal court is bound to observe the greatest possible respect for Congress consistent with its duty of protecting citizens' constitutional rights. Since a person subjected to a subpoena ordinarily will have an adequate remedy other than injunctive relief, the traditional practice of judicial restraint in this area comports well with the doctrine of separation of powers.

In the present case, however, plaintiffs plainly have no remedy other than injunctive relief, inasmuch as the subpoena is directed to the Chemical Bank rather than to the United States Servicemen's Fund. Thus, the traditional rationale for judicial abstention is inapplicable on the facts of this case. In such circumstances, the Court is unwilling to hold that it is without power to consider the merits of plaintiffs' complaint. *Stamler* v. *Willis*, 415 F.2d 1365 (7th Cir. 1969). By so holding, the Court is not unmindful of the caution which should be observed when passing upon an act of Congress undertaken pursuant to that body's broad investigative power. The interest of Congress in carrying out its legislative function will weigh heavily in the decision on the merits of plaintiffs' complaint and on the merits of their motion for preliminary injunction.

In view of the Court's holding that, on the narrow facts presented here, a justiciable issue is presented, it is unnecessary to reach plaintiffs' argument that the issues raised by their motion for injunction are justiciable under the

broader principle enunciated in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). *Cf. Stamler* v. *Willis, supra.*

III. Motion for Preliminary Injunction.

A motion for a preliminary injunction requires the Court to exercise its discretion based upon a series of estimates, among which are the relative injuries to the parties, the extent to which the public interest is involved, and the probability of ultimate success or failure of the suit. *Perry* v. *Perry*, 190 F.2d 601 (D.C. Cir. 1951). Consideration of these factors in the context of the case presented, leads the Court to conclude that plaintiffs' motion for a preliminary injunction should be denied.

The probability that plaintiffs will be successful in their suit is of critical importance when the body sought to be restrained is a committee of Congress. As noted earlier, plaintiffs challenge the validity of the subpoena upon several grounds. First, they argue that the subpoena has never been properly authorized, because the Subcommittee Resolution of October 14, 1967, authorized investigation solely into "the activities of the National Conference for New Politics and any organizations and individuals affiliated or associated therewith." Since there was no testimony at the hearing that there ever was or has been any connection between the National Conference for New Politics and United States Servicemen's Fund, and especially since the U.S.S.F. was not organized until some nine months after the National Conference for New Politics was dissolved in April, 1968, plaintiffs contend that there is no authorization for subpoenaing any records concerning the U.S.S.F.

In the Court's opinion, however, the validity of the subpoena is not to be measured by reference to the October 14, 1967, Resolution. Rather, the Resolution of March 11, 1970, authorizes an independent investigation of the U.S.S.F. which merely grew out of evidence gathered in the

course of the investigation conducted pursuant to the Resolution of October 14, 1967. Accordingly, plaintiffs' argument that the investigation and subpoena had not in fact been authorized must fail.

Plaintiffs also challenge the subpoena on the ground that the Subcommittee investigation is not being conducted in pursuance of a proper legislative purpose, *Watkins* v. *United States*, 354 U.S. 178 (1957), and that the Subcommittee's charter resolution, Resolution 341, is unconstitutionally vague. The essential language of that Resolution is as follows:

> Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized . . . to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

Plaintiffs assert that the Subcommittee apparently is proceeding wtih its investigation under Part (3) of Resolution 341 and, more specifically, to investigate "infiltration by persons who are or may be under the domination of . . . any . . . movement seeking to overthrow the Government of the United States by force or violence." This very part of the same Resolution, however, has been sustained in the face of a challenge that it is unconstitutionally vague. *Shelton* v. *United States*, 280 F.2d 701 (D.C. Cir. 1960), *rev'd on other grounds sub. nom. Russell* v. *United States,*

369 U.S. 749 (1962). The Court is not persuaded that subsequent decisions of the Supreme Court cast doubt on the continued validity of the *Shelton* holding. See also *Sacher* v. *United States*, 252 F.2d 828 (D.C. Cir. 1958), *rev'd on other grounds*, 356 U.S. 576 (1958).

Shelton also sheds considerable light on the issue of whether a valid legislative purpose exists for his investigation. There, the Senate Internal Security Subcommittee was conducting an investigation into the extent of communist infiltration into the news media. Shelton, called to testify, refused to answer a question concerning membership in the Communist Party, and, when prosecuted for contempt of Congress, argued, in addition to vagueness, that the investigation violated the First Amendment because it would deter newspapers from hiring persons of unpopular minority views and associations. In finding that the investigation carried a valid legislative purpose, the Court emphasized the importance of a free press to preservation of the Government. Judge (now Chief Justice) Burger said:

> [T]his inquiry was in no sense an investigation into the press as such, but into the question whether the constitutionally guaranteed freedom of the press was being used to undermine that very freedom and the foundation on which it rests. *Barenbldt* authorizes such inquiry. The investigatory power of Congress flows from the right of the Government to preserve itself and its institutions. The importan right of the press to be free is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures.

280 F.2d at 707.

The analogy to the present case is apparent. The U.S.S.F. is an organization whose sole focus is on the servicemen of this country. Although there has been no evidence that any of its activities, or those it supports, have been of a type not protected by the First Amendment, it

cannot be denied that Congress has a right to scrutinize closely possible infiltration of subversive elements into an organization which directly affects the armed forces of this country. Just as an investigation into possible abuse of First Amendment rights directed at the undermining of the news media (*Shelton*) or of educational institutions (*Barenblatt*) was held proper, so here investigation into possible abuse of First Amendment rights directed at undermining the nation's armed forces is *a fortiori* a proper subject of legislative inquiry. Congress needn't withhold investigation until infiltration has manifested itself in acts directed toward overthrow of the Government of a type clearly not protected by the First Amendment.

The Court is not unmindful that Congress has no authority to expose the private affairs of individuals without justification in terms of the functions of Congress. *Watkins* v. *United States*, 354 U.S. 178 (1957). *Cf. Boorda* v. *Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969). This is not a case of "exposure for exposure's sake." Furthermore, there is such justification for whatever exposure takes place.

There is the clearly stated constitutional power of Congress "to raise and support armies,"[1] "to make rules for the government and regulation of the land and naval forces" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Arver, et al.* v. *United States*, 245 U.S. 366, at 377. This power is not limited to periods of declared war, *Ashwander* v. *T.V.A.*, 297 U.S. 288. In *Barenblatt*, 360 U.S. 109, the Supreme Court recognized the power of Congress to investigate communist influences in the field of education. It is evident that the recognized power of Congress to investigate incident to its power to legislate is under these circumstances more clearly established than in *Barenblatt*.

---

[1] Art. I, Sec. 8.

The Court also recognizes that mere presence of a valid legislative purpose does not foreclose plaintiffs' claim to protection from the subpoena. Even assuming a valid purpose, the legislative interest must be weighed against the injury to First Amendment rights which will flow from its execution. *NAACP* v. *Alabama*, 357 U.S. 449 (1958). But plaintiffs' witnesses could do little more than speculate as to the effect that disclosure of their contributors would have. Moreover, several contributors are said to have remained anonymous even from U.S.S.F. officials; manifest disclosure of Bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity. The showing of plaintiffs with respect to the adverse effect on contributors falls far short of establishing the requisite element of a preliminary injunction, namely, irreparable injury. *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958). In the face of such a strong legislative (and public) interest in the investigation at issue here, plaintiffs' showing of injury to First Amendment rights is insufficient to warrant a finding of probable success at a full trial, *cf. NAACP* v. *Alabama*, *supra*, and, coupled with the validity of the Subcommittee action, certainly is an insufficient basis for granting injunctive relief against a committee of Congress. *Cf. Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

For the foregoing reasons, it is by the Court this 30th day of June, 1970,

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs' motion for preliminary injunction is denied.

/s/ OLIVER GASCH
Oliver Gasch
Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1474-70

UNITED STATES SERVICEMEN'S FUND, ET AL., *Plaintiffs*,

v.

JAMES O. EASTLAND, ET AL., *Defendants*.

MEMORANDUM

This matter comes before the Court on plaintiffs' motions for permanent injunction and to compel the taking of further depositions and defendants' opposition thereto.

Plaintiff contends it is a non-profit organization established for the purpose of furthering the welfare of persons in military service. It provides financial support to "G.I. coffeehouses" (gathering places near military bases where G.I.'s can associate with persons both in and outside of the military), "G.I. newspapers" (newspapers published by and for persons in military service which raise issues of concern to them—including opposition to the war in Vietnam), and civilian legal defense for persons in the military. In addition, the Fund has provided entertainment, books, newspapers, and library materials upon request. The record as to the precise nature of the material in question is somewhat vague, with references to "tapes of Malcolm X" and "political literature" serving as the most specific descriptions of the types of material provided by the Fund. It is said, however, the Fund exercises no editorial control over newspapers or other activities which it supports, and decisions to fund newspapers are in no respect influenced by the expected nature of the activity.

On April 16, 1970, the Senate Subcommittee on Internal Security (hereafter referred to as the Subcommittee) issued a subpoena duces tecum to the Chemical Bank of New York

City requiring the Bank to furnish the Subcommittee with all of the Bank's records relating to the account of the plaintiff. This subpoena was subsequently withdrawn by the Subcommittee because of an error in the precise name of the plaintiff organization in the Resolution authorizing the subpoena. A corrected subpoena was issued, but subsequently withdrawn upon the oral request of plaintiffs. A third subpoena, returnable on June 4, 1970, was then issued. It is this subpoena which plaintiffs challenge.

On June 1, another Judge of this Court denied plaintiffs' motion for a temporary restraining order on the ground that the Court was without subject matter jurisdiction, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. On June 4, the Court of Appeals issued an Emergency Stay, finding "that the issues involved as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order." *United States Servicemen's Fund, et al.* v. *Eastland*, No. 24,279 (D.C. Cir. June 4, 1970). Accordingly, a hearing was held June 16 and 17, 1970, and this Court denied preliminary injunction in a memorandum opinion of June 30, 1970. The Court of Appeals issued an emergency stay on July 2, 1970, which was extended on July 28, 1970. An order was then issued dismissing defendant Eastland as a party-defendant and staying depositions to allow the United States Senate to authorize the testimony of defendant Sourwine as Chief Counsel to the Senate Subcommittee on Internal Security. On October 13, 1970, the Senate passed S. Res. 478 which authorized defendant Sourwine to testify only as to those matters of public record. Pretrial depositions were conducted on November 18, 1970, wherein defendant Sourwine limited his answers to the proscriptions of S. Res. 478. Plaintiffs then moved this Court to compel further testimony and production of certain

legislative documents. On February 23, 1971, a hearing was conducted on the motion for permanent injunction.

There are, thus, two questions presented for determination. First, whether plaintiffs are entitled to a permanent injunction and second, whether defendant Sourwine can be compelled to give testimony beyond the limitations imposed by S. Res. 478. It is the opinion of this Court that the answers to both are in the negative.

In their memorandum in support of permanent injunction plaintiffs once again contend that the Subcommittee's investigatory mandate is vague in violation of the First and Fifth Amendments and that the investigation in question has not been conducted pursuant to a proper legislative purpose and, therefore, the investigation and the subpoena issued pursuant thereto are violative of the First and Fifth Amendments. As neither the hearings on the motion nor the supporting briefs raise new material matter, the Court relies on its memorandum of June 30, 1970, in which these issues are fully discussed, and finds no violation of the First or Fifth Amendments.

As to the discovery question, while the Court is mindful that the doctrine of legislative immunity is less absolute when applied to employees of legislative bodies rather than to legislators themselves,[1] there has been no reference to, nor has the Court been able to find, authority for the proposition that a legislative employee's vulnerability to suit requires this Court to afford complete satisfaction of plaintiffs' discovery requests when such discovery is specifically barred by a Senate resolution. As to the merits of plaintiffs' specific discovery requests, Rule 26 of the Federal Rules of Civil Procedure, which sets forth the general provisions governing discovery, provides in Subsection 26(b)(1) that parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject

---

[1] *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

matter involved in the pending action. The testimony of defendant Sourwine which plaintiffs ask the Court to compel and the documents which the plaintiffs ask the Court to order produced are privileged. It is clear, and the plaintiffs do not otherwise contend, that the information sought from the defendant has been received by him pursuant to his official duties as a staff employee of the Senate or from the documents under the control of and in the possession of the United States Senate. As such, the information is within the privilege of the Senate and subject to a claim of privilege by that body. *Senate Rule 301, Senate Manual, Senate Document No. 1 of the 90th Congress, First Session.* See also, *Senate Procedure,* Senate Document No. 44, 88th Congress, First Session, p. 272, 275; Cannon *Precedents of the House of Representatives,* Vol. VI, Sec. 585-588. Moreover, as these same authorities well demonstrate, the privileged character of the documents is, likewise, clear. These documents are the records of the United States Senate, they are not records under the possession, custody or control of an individual Senate Staff member. The United States Senate made a timely and appropriate claim of its privilege as it relates to the testimony of the defendant and to the production of the requested documents [2] and the testimony and the documents do *not* constitute matter not privileged within Rule 26.

As such, and in light of this Court's desire not to interfere with the proper activity of a co-ordinate branch of government, plaintiffs' motions for permanent injunction and to compel further depositions are hereby denied.

/s/ OLIVER GASCH
Judge

Date October 21, 1971

[2] Moreover, it is well settled that a person cannot be compelled to produce a document which is neither in his possession or under his control. *In re Rivera,* 79 F.Supp. 510, 511 (S.D.N.Y.), *Bough* v. *Lee,* 29 F.Supp. 498, 501 (S.D.N.Y.); In Re Harris, 27 F.Supp. 480, 481 (S.D.N.Y.).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 1474-70

Nos. 24,279, 24,412, 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Appeal from the United States District Court for the District of Columbia

Before: Bazelon, Chief Judge, Tuttle,* Senior Circuit Judge for the Fifth Circuit, and MacKinnon, Circuit Judge

JUDGMENT

(Filed August 30, 1973)

This case, combined for argument and consideration on appeal with cases numbered 71-1609, 71-1963 and 71-1717, came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court in accordance with the opinion of this Court filed herein this date.

This court's rulings with respect to cases numbered 71-1609, 71-1693 and 71-1717 will be entered at a later date.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Clerk

Date: August 30, 1973
Opinion for the Court filed by Circuit Judge Tuttle.
Dissenting opinion filed by Circuit Judge MacKinnon.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 828-71

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

Civil Action 1009-71

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, Chief Judge, TUTTLE,* Senior Circuit Judge for the Fifth Circuit, and MACKINNON, Circuit Judge

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

(Filed October 26, 1973)

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed, and the cases are hereby remanded to the District Court for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Clerk

Judge MacKinnon respectfully dissents for the reasons stated in his dissenting opinion in *United States Servicemen's Fund* v. *Eastland* (Nos. 24,279, 24,412 & 71-2034, decided August 30, 1973).

MEMORANDUM

As stated in the opinion of this Court in *United States Servicemen's Fund, et al.* v. *James O. Eastland, et al.*, No. 71-2034 (decided August 30, 1973, U.S.C.A. D.C. Circuit), these three cases were combined for argument and consideration on appeal with that case because it was considered by all parties that a decision in that case might well control the disposition of these. The judgments of the trial court granting preliminary injunctions in the three cases, pending a determination by this Court of the *U. S. Servicemen's* case, are AFFIRMED. The cases are REMANDED to the district court for further consideration in light of *U. S. Servicemen's Fund, Inc.* v. *Eastland, et al., supra.*

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

Civil Action 828-71

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

71-1693

NATIONAL PEACE ACTION COALITION, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon and Wilkey, Circuit Judges

ORDER

On consideration of appellees' suggestion for rehearing *en banc*, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion is denied.

Per Curiam
For the Court:

/s/ HUGH E. KLINE
Clerk

Judges Tamm, MacKinnon and Wilkey would grant rehearing *en banc* for the reasons stated in Judge MacKinnon's dissent in Nos. 24,279, 24,412 and 71-2034, *United States Servicemen's Fund* v. *Eastland*, decided 30 August, 1973.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

Civil Action 828-71

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Before: Bazelon, Chief Judge; Tuttle,* United States Senior Circuit Judge for the Fifth Circuit; and MacKinnon, Circuit Judge

* Sitting by designation pursuant to Title 28, U.S.C. § 294(d).

ORDER

(Filed January 23, 1974)

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam
For the Court:

/s/ HUGH E. KLINE
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, ET AL.,
Petitioners

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

NATIONAL PEACE ACTION COALITION, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PROGRESSIVE LABOR PARTY

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

A. Relevant Docket Entries:

(1) *United States Servicemen's Fund, et al. v. James O. Eastland, et al.* 2

(2) *Progressive Labor Party, et al. v. Committee on Internal Security of the United States House of Representatives, et al.* 6

(3) *Peoples Coalition for Peace and Justice v. Committee on Internal Security of the United States House of Representatives, et al.* 7

(4) *National Peace Action Coalition, et al. v. Committee on Internal Security of the United States House of Representatives, et al.* 8

B. Amended Complaint of United States Servicemen's Fund 10

C. Orders of the Lower Courts:

(1) United States Servicemen's Fund:

(a) District Court Order dropping Congressional parties-defendants 19

(b) District Court Order denying plaintiffs' application for temporary restraining order June 1, 1970 20

(c) Court of Appeals Order granting emergency stay requested by appellants, June 4, 1970 21

(d) District Court Memorandum and Order denying defendants motion to dismiss, June 30, 1970 23

(e) United States Court of Appeals Order staying enforcement of subpoena 33

(f) Court of Appeals Order extending stay and ordering expedition, July 28, 1970 .. 34

Page

(g) District Court Memorandum and Order denying plaintiffs' motions for permanent injunction and to compel further depositions, October 21, 1971 35

(2) Progressive Labor Party:

(a) Preliminary Injunction 39

(3) National Peace Action Coalition:

(a) Preliminary Injunction 41

(b) Second Preliminary Injunction 42

(4) Peoples Coalition for Peace and Justice:

(a) Preliminary Injunction 44

D. Opinion of the United States Court of Appeals in *United States Servicemen's Fund, et al. v. James O. Eastland, et al.* 47

E. (1) Court of Appeals Judgment, filed August 30, 1973 113

(2) Court of Appeals Judgment, filed October 26, 1973 115

F. (1) Court of Appeals Order denying rehearing January 23, 1974 117

G. Subpoenas:

(1) United States Servicemen's Fund, returnable June 4, 1970 119

(2) Progressive Labor Party, Filed April 29, 1971 120

(3) (a) National Peace Action Coalition, issued May 12, 1971 121

(b) National Peace Action Coalition, issued May 18, 1971 122

(4) Peoples Coalition for Peace and Justice, issued May 18, 1971 123

Page

II. Senate Resolutions:

(1) S. Res. 341, 91st Cong. 2d Sess. 124

(2) Senate Internal Security Subcommittee Resolution, October 14, 1967 126

(3) Senate Internal Security Subcommittee Resolution, March 11, 1970 127

(4) Senate Internal Security Subcommittee Resolution, May 18, 1970 128

(5) Reprint from October 13, 1970 Congressional Record 128

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1923

James O. Eastland, et al.,
Petitioners

v.

United States Servicemen's Fund, et al.

Committee on Internal Security of the United States House of Representatives, et al.,
Petitioners

v.

National Peace Action Coalition, et al.

Committee on Internal Security of the United States House of Representatives, et al.,
Petitioners

v.

Peoples' Coalition for Peace and Justice, et al.

Committee on Internal Security of the United States House of Representatives, et al.,
Petitioners

v.

Progressive Labor Party

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 1474-70

UNITED STATES SERVICEMEN'S FUND, *et al.*,
Plaintiffs-Appellees

v.

JAMES O. EASTLAND, *et al.*,
Defendants-Appellants

RELEVANT DOCKET ENTRIES

Date	Proceedings
1970	
May 14	Complaint, appearance; Exhibits A, B, C, filed.
May 14	Motion of Plaintiffs for Temporary Restraining Order; Points & Authorities; Affidavit, filed.
May 15	Motion of plaintiff for temporary restraining order; moot; complaint dismissed without prejudice. (N) Pratt, J.
June 1	Motion of Plaintiffs to reinstate; Exhibits (2) "Granted" Pratt, J.
June 1	Motion of Plaintiffs for a temporary restraining order.
June 1	Temporary Restraining order denied; Order to follow "Fiat" Pratt, J.
June 1	Order denying plaintiffs application for a temporary restraining order, Pratt, J.
June 1	Notice of appeal by plaintiffs from order 6-1-70, filed.
May 26	Order dismissing action without prejudice; plaintiffs may move to reinstate action to amend complaint (N) Pratt, J.

June 4	Certified copy of order USCA granting emergency stay requested by appellants, until the USDC has an opportunity to fully consider this matter and directing this Court to expedite consideration of this case filed.
June 8	Motion of Congressional defendants to dismiss; Points & Authorities; exhibits A, B, C & D; Points & Authorities; filed.
June 8	Opposition of Congressional defendants to plaintiffs' motion for a temporary restraining order and to granting of injunctive relief, filed.
June 15	Motion of plaintiffs for preliminary injunction, filed.
June 16	Exhibits A, B, C & D by defendants.
June 16	Plaintiffs' motion to dismiss taken under advisement; hearing begun; recessed until 6-17-70, Gasch, J.
June 17	Hearing resumed and concluded; parties to submit Findings of Fact and Conclusions of Law within one week.
June 22	Case reassigned from Judge Pratt to Judge Gasch.
June 24	Supplemental brief by plaintiff in support of their motion for a preliminary injunction and in opposition to the defendants motion to dismiss.
June 24	Supplemental memorandum by defendants; exhibits.
June 30	Memorandum and Order denying plaintiffs' motion for preliminary injunction (N) Gasch, J
July 2	Notice of appeal by plaintiffs from order of June 30, 1970; filed.
July 31	Answer of defendants to amend complaint; e m 7-31-70
Aug. 17	Notice of plaintiffs taking deposition of defendant Eastland and Sourwine;
Aug. 19	Motion of defendants to stay taking of deposition and for protective order.
Aug. 19	Motion of defendant for expeditious hearing on merits; Points & Authorities.

Aug. 19—Motion of defendants to vacate request for production of documents.

Aug. 19—Motion of defendants to vacate notice to take deposition; Points & Authorities.

Aug. 19—Motion of defendants to drop parties-defendants; Points & Authorities.

Aug. 19—Order granting defendants' motion to drop U.S. Senators as party-defendants, Gasch, J.

Aug. 19—Order vacating notice to take deposition of dedefendant James O. Eastland, Gasch, J.

Aug. 19—Ordered that no discovery be had of defendant Sourwine prior to 8-31-70; further ordered deposition of defendant Sourwine be taken only at the offices of said defendant. (N) Gasch, J.

Aug. 31—Notice of plaintiffs to take deposition of defendant J. G. Sourwine; filed.

Sept. 17—Motion of plaintiffs for an order directing compliance with plaintiffs' notice to take depositions or in the alternative motion to quash the subpoena; Points & Authorities filed.

Sept. 24—Motion of defendant Sourwine to stay discovery and for protective order; Points & Authorities; c/m 9-24-70; filed.

Sept. 24—Opposition of defendant Sourwine to motion for an order directing compliance with plaintiffs' notice to take depositions or in the alternative motion to quash subpoena herein; filed.

Oct. 2—Opposition of plaintiffs' to defendants' motion for stay of discovery and for protective order; filed.

Oct. 2—Appendix A of plaintiff in opposition to defendants' motion for stay of discovery. Filed.

Oct. 16—Certified copy of a Resolution of United States Senate, Senate Resolution 478 relating to this case. Filed.

Oct. 29—Certified copy of order of U.S. Court of Appeals denying motion to dismiss appeal and vacate stay. Filed.

Dec. 14—Motion of plaintiffs for order compelling answers and production of documents pursuant to Rule 37(a); Points & Authorities; Appendix 1, filed.

Dec. 14—Motion of plaintiffs for adjournment of hearing; filed.

Dec. 21—Corrected copy of plaintiffs' memorandum in support of plaintiffs' motion for order compelling answers & production of documents; filed.

Dec. 22—Deposition of Julian G. Sourwine for plaintiffs published and filed.

Dec. 30—Opposition of defendant Sourwine to plaintiffs' motion for order compelling answers and production of documents; Points & Authorities; filed.

1971

Jan. 18—Motion of plaintiffs for leave to file reply to defendants' opposition to plaintiffs' motion for order compelling answers filed with this Court 12-30-70; Points & Authorities; Affidavit; exhibit; filed.

Feb. 23—Motion of plaintiff to compel defendants to take depositions heard and taken under advisement. Gasch, J.

Mar. 9—Memorandum by defendants. Filed.

May 24—Memorandum by plaintiffs in support of permanent injunction; exhibit; errata sheet; filed.

Aug. 30—Supplemental memorandum in support of defendants' opposition to plaintiffs' motion for order compelling answers and production of documents filed.

Sept. 9—Supplemental memorandum in support of plaintiffs' motion for order compelling testimony; filed.

Sept. 16—Reply of defendants to supplemental memorandum in support of their motion for order compelling testimony; filed.

Sept. 29—Rejoinder of plaintiffs concerning the applicability of the Attorney-Client privilege; filed.

Oct. 21—Memorandum denying motion of plaintiff for permanent injunction and to compel further depositions. Gasch, J.

Nov. 11—Notice of appeal by plaintiffs from order of 10-21-71; filed.

1974

Feb. 13—CERTIFIED Copy of Order from USCA reversing judgment of the District Court and remanding case to District Court in accordance with the opinion filed herein this date; Orders (2) amending opinion; Opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1609

PROGRESSIVE LABOR PARTY, *et al.*,
Plaintiffs-Appellees,

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

Date — Proceedings

1971

April 26—Complaint, appearance, Exhibits 1 & 2 filed.

April 26—Plaintiffs' application for a temporary restraining order: Affidavits (2): Exhibits (2), filed.

April 26—Preliminary memorandum of Points & Authorities in support of plaintiffs' application for a temporary restraining order, filed.

April 29—Order granting in part and denying in part preliminary injunction relative to subpoenas issued 4-13-71 (N) Hart, J.

April 29—Exhibits 1A, 1B, and 1C, filed.

June 25—Stipulation extending time for defendants to respond to complaint to and including 7-26-71, filed.

June 28—Notice of appeal defts.

July 26—Answer of Defendants; appearance of Benjamin C. Flannagan.

Date — Proceedings

1974

Jan. 31—CERTIFIED copy of JUDGMENT USCA affirming judgments of the District Court and remanding case to the District Court. Memorandum attached.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE, *et al.*,
Plaintiffs-Appellees

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

Date — Proceedings

1971

May 27—Complaint, appearance, Exhibits A, B, C: Affidavits (2), filed.

May 27—Application for a temporary restraining order: Notice: Exhibit to Affidavit: Points & Authorities, filed.

May 27—Motion for a preliminary injunction, filed.

May 27—Motion of plaintiffs for preliminary injunction argued and granted. Jones, J.

May 28—Motion of plaintiffs for preliminary injunction; affidavit of William Pouthard; Exhibits 1 and 2; Points & Authorities, filed.

May 28—Preliminary Injunction. (N) Jones, J.

June 3—Certificate of service by plaintiff on copy of preliminary injunction on 6-1-71, filed.

June 22—Answer of defendant 12 to the Complaint.

Date Proceedings

1971

June 29—Stipulation of deft. Public National Bank that it has no objection to plaintiff's motion to consolidate, filed.

June 29—Motion of plaintiffs to consolidate action with CA 1009-71, granted. (Filed in CA 1046-71) Jones, J.

July 26—Answer of defendants to complaint, filed.

July 26—Calendared.

July 26—Notice of appeal by defendants from order of 5-28-71, filed.

1974

Jan. 31—CERTIFIED copy of Judgment, USCA Affirming judgments of the District Court; Remanding case to the United States District Court; Memorandum attached.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1693

NATIONAL PEACE ACTION COALITION, *et al.*,
Plaintiffs-Appellees,

v.

COMMITTEE ON INTERNAL SECURITY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

Date Proceedings

1971

May 21—Complaint, appearance, Exhibits A, B, C filed.

May 21—Application of plaintiffs for a Temporary Restraining Order; Affidavit of Jerry Gordon; Affidavit of Jeremiah Gutman; preliminary Memorandum of Points & Authorities filed.

May 21—Affidavit of plaintiff re Notice to Defendant of Temporary Restraining Order application, filed.

May 21—Application for Temporary Restraining Order and Motion for Preliminary Injunction granted in part. (N) Jones, J.

May 21—Order for Preliminary Injunction. (N) Jones, J.

May 24—Affidavit of Marcia Sweetenbom of service on Preliminary Injunction on May 24, 1971, filed.

May 27—Motion of plaintiffs for modification of preliminary injunction; affidavit; Points & Authorities, Exhibits 1, 2, & 3, filed.

May 27—Motion of plaintiffs for modification of the existing preliminary injunction argued and granted. (Order to be presented.) Jones, J.

May 28—Affidavit of Patricia A. Grogan; Exhibits 1 & 2; filed.

May 28—Second preliminary injunction. (N) Jones, J.

May 28—Affidavit of Patricia Grogan; Exhibit (1), filed.

June 3—Certificate of service by plaintiffs on copy of preliminary injunction, filed.

June 14—Answer of defendant 12 to the Complaint, filed.

June 29—Motion of plaintiffs to consolidate action with C.A. 1046-71—granted. (Copy filed in C.A. 1046-71). Jones, J.

July 20—Notice of appeal by defendants from the orders of May 21, 1971 and May 28, 1971.

July 20—Stipulation extending time for defendants to answer the complaint to and including July 26, 1971, filed.

July 26—Answer of Congressional defendants.

July 26—Calendared CD/N

1974

Jan. 31—CERTIFIED copy of Judgment, USCA Affirming judgments of the District Court; Remanding case to the United States District Court; Memorandum attached.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1474-70

UNITED STATES SERVICEMEN'S FUND, 135 WEST 49TH STREET, NEW YORK, NEW YORK 10011; ROBERT ZEVIN, 430 WEST 250TH STREET, NEW YORK, NEW YORK 10471; CORINNA FALES, 328 WEST 12TH STREET, NEW YORK, NEW YORK, 10014,

Plaintiffs

v.

JAMES O. EASTLAND, JOHN L. MCCLELLAND, SAM ERVIN, BIRCH BAYH, THOMAS J. DODD, ROBERT C. BYRD, STROM THURMOND, MARLOW W. COOK, ROBERT P. GRIFFIN, HUGH SCOTT, J. G. SOURWINE, AS CHAIRMAN, MEMBERS AND STAFF COUNSEL OF THE SUBCOMMITTEE ON INTERNAL SECURITY OF THE COMMITTEE OF THE JUDICIARY OF THE UNITED STATES SENATE, AND THE CHEMICAL BANK NEW YORK TRUST COMPANY,

Defendants

AMENDED COMPLAINT

Plaintiffs amend their complaint for injunctive and declaratory relief herein by alleging in addition to all of the allegations set forth in the Complaint, the following which have occurred since the date of said Complaint.

I. PARTIES

A. *Plaintiffs*

1. UNITED STATES SERVICEMEN'S FUND (hereinafter, USSF) is a non-profit tax-exempt membership corporation incorporated in the State of Delaware to further the welfare of persons who have served or are presently serving in the military. Among its charitable, educational and legal purposes and powers as stated in its certificate of incorporation are the following:

1) to stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:

2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;

3) Executing, sponsoring and encouraging research designed to improve the general welfare of military personnel;

4) Contributing to the costs of legal representation of military personnel;

5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;

6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life.

In furtherance of these purposes USSF provides funds for (a) the establishment and operation of coffee houses, which are gathering places, and places of recreation for persons in military service as well as the providing of entertainers for military personnel; (b) the establishment and operation of newspaper which provide information particularly of interest to military personnel; (c) the supplying of educational materials such as films, books, periodicals, and entire libraries for military personnel; (d) the providing of civilian legal representation for military personnel due to the inadequacies of military justice.

Both the G.I. coffee houses and newspapers have become the focus of dissent and expressions of opposition within the military toward the war in Vietnam and now Cambodia, and are frequent targets of repressive actions by both civilian and military authorities seeking to silence dissent. All of the activities of USSF are conducted in

exercise of its rights under the United States Constitution and particularly the First Amendment guarantees of Freedom of speech, press and association.

2. Robert Zevin is a citizen of the State of New York and of the United States. Plaintiff Zevin is the Secretary-Treasurer of the Board of Directors of USSF, and as such is the signatory having control of the bank account of the organization.

3. Corinna Fales is a citizen of the State of New York and of the United States. Plaintiff Fales is the Executive Director of USSF.

B. *Defendants*

4. Defendant James O. Eastland is a citizen of the State of Mississippi and of the United States. He is sued in his official capacity as Chairman and member of the Subcommittee on Internal Security of the Committee of the Judiciary of the United States Senate (hereinafter the Subcommittee).

Defendants members of the Subcommittee are John L. McClelland, a citizen of the State of Arkansas and of the United States; Sam Ervin, a citizen of the State of North Carolina and of the United States; Birch Bayh, a citizen of the State of Indiana and of the United States; Thomas J. Dodd, a citizen of the State of Connecticut and of the United States; Robert C. Byrd, a citizen of the State of West Virginia and of the United States; Strom Thurmond, a citizen of the State of South Carolina and of the United States; Marlow W. Cook, a citizen of the State of Kentucky and of the United States; Robert P. Griffin, a citizen of the State of Michigan and of the United States; Hugh Scott, a citizen of the State of Pennsylvania and of the United States.

They are sued in their official capacities as members of the Subcommittee.

5. J. G. Sourwine, a citizen of the District of Columbia and of the United States, is sued in his official capacity as Chief Counsel of the Subcommittee.

6. Chemical Bank New York Trust Company is, upon information and belief, a banking association incorporated under the laws of the State of New York with its executive offices at 20 Pine Street, New York. On information and belief defendant bank is doing business in Washington, D.C.

II. Jurisdiction

7. The jurisdiction of this Court arises under 28 U.S.C. 1331, 1332, 1343(3) and (4), 2201, 2202; 42 U.S.C. 1981 et seq.; and under the United States Constitution and in particular the First, Fourth, Fifth, and Ninth Amendments thereto.

The amount in controversy, exclusive of interests and costs, exceeds the sum of $10,000, insofar as the actions of defendants complained of herein threaten to deprive plaintiffs of both concretely valuable and incalcuably valuable rights and privileges.

III. Cause of Action

8. The USSF maintains its bank account at the Chemical Bank New York Trust Company, 2900 Broadway, New York, N.Y.

9. On or about April 20, 1970, the Subcommittee on Internal Security of The Committee of The Judiciary of the United States Senate (hereinafter the Subcommittee) caused to be served on the Chemical Bank New York Trust, 20, Pine Street, New York, New York, a subpoena duces terum demanding the production of ". . . any and all records appertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or

microfilm thereof within your control or custody or within your means to produce." Subpoena annexed hereto as Exhibit A.

10. Said subpoena was returnable on May 18, 1970, at 10 A.M. at Room 2300, New Senate Office Building, Washington, D.C. 20510.

11. On May 14, 1970 Plaintiffs filed this action seeking injunctive and declaratory relief.

12. On May 15, 1970, just prior to their scheduled argument on Plaintiff's motion for a Temporary Restraining Order, counsel for Plaintiffs were informed by counsel for Defendants that the subpoena contested in their complaint had been withdrawn subject to reissuance.

13. In light of the withdrawal of said subpoena, the action was dismissed without prejudice to Plaintiffs reinstating the action and filing an amended complaint should a new subpoena be served.

14. On May 26, 1970, attorneys for Plaintiffs were informed by the Chemical Bank New York Company that a new subpoena had been issued returnable on May 28, 1970.

15. Because of the extremely short notice, at the request of attorneys for Plaintiffs, that subpoena was withdrawn, and on May 28, 1970 a third subpoena issued, which, on information and belief is substantially identical to that annexed to Plaintiff's complaint. This third subpoena is returnable on June 4, 1970.

16. Defendant Subcommittee members and staff caused the aforesaid subpoena to be issued under color of law under the authority of Senate Resolution 366 approved by the 81st Congress-2nd Session as amended and extended, and Senate Resolution 341 agreed to February 16, 1970.

(See Exhibits B and C annexed hereto for Text of Resolutions.)

17. Senate Resolutions 366 and 341 are illegal and void as applied, to authorize the aforesaid subpoenas, and as utilized by the defendant committee members and staff counsel in that they violate the United States Constitution and, in particular, the First, Fourth, Fifth, Ninth and Tenth Amendments thereto, for the following reasons among others:

a) Senate Resolutions 366 and 341 are overbroad and vague in violation of the United States Constitution. Their overbroad sweep inhibits and deters the exercise of freedom of speech, press and assembly, privacy to remain silent and association in violation of the First Amendment to the Constitution of the United States.

b) It appears from both the origin of the Senate Resolutions and the setting within which the Subcommittee has operated pursuant to its authority that Senate Resolution 366 as amended and extended and Senate Resolution 341 purport to establish a general authority in the Subcommittee to expose publicly without justification, in terms of legislative function and in excess of any powers granted to the Congress under the United States Constitution, the private affairs of citizens and groups expressing dissenting political views.

c) Senate Resolutions 366 and 341 purport to authorize such a sweeping, unlimited and all-inclusive compulsory examination of witnesses in the constitutionally protected areas of speech, press, petition and assembly, that they violate the procedural requirements of the Due Process Clause of the Fifth Amendment to the United States Constitution.

d) The delegation of authority by the Senate to the Subcommittee contained in Senate Resolutions 366 and 341 is so vague, ambiguous and uncertain that it cannot support or authorize investigations by the Subcommittee which affect or deter the citizen of the United States in the

exercise of his rights of freedom of speech, press, petition and assembly, as guaranteed by the First Amendment to the federal Constitution.

e) Senate Resolutions 366 and 341 purport to sanction a usurpation of the functions of the executive and judicial branches of the national government, in violation of the principle of separation of powers which underlies the Constitution of the United States.

f) Senate Resolutions 366 and 341 violates the prohibition against Bills of Attainder set forth in Article I, Section 9, Clause 3 of the Constitution in that they authorize and provide for legislative punishment.

g) Senate Resolutions 366 and 341 violate Article III of the Constitution in that they sanction and authorize the imposition of punishment for the exercise of rights otherwise guaranteed by the First Amendment.

h) Senate Resolutions 366 and 341 have authorized the creation of a governmental mechanism with the sole purpose and objective of forcing public disclosure of beliefs, opinions, expressions and associations of private citizens which may be unorthodox or unpopular, resulting in public stigma, scorn and obloquy, all beyond any powers granted to the Congress by the Constitution of the United States.

18. The sole purpose for the issuance of the aforesaid subpoena by the defendant Committee members and staff is to harass, chill, punish and deter plaintiffs in their exercise of their rights and duties under the First Amendment and particularly to stifle the freedom of the press and association guaranteed by that amendment.

19. On information and belief, the aforesaid subpoena is part of a broad scheme by various branches of the Government to use and abuse the power of subpoena to stifle freedom of the press and inhibit the press from expressing

views contrary to that of the Government and deter the press from criticizing Government policies.

20. The aforesaid subpoena, issued under the void and illegal Senate Resolutions 366 and 341, violates plaintiffs' rights under the United States Constitution and in particular their rights of privacy and their rights of freedom of speech, freedom of press, freedom of association and freedom from unreasonable search and seizure as guaranteed by the First, Fourth, Fifth, Ninth and Tenth Amendments.

21. On information and belief, the aforesaid subpoena was issued in violation of the rules of the Subcommittee and are therefore void.

22. The aforesaid subpoena on its face, is so sweeping and broad as to violate the Fourth Amendment to the Constitution.

23. The vast array of documents and information demanded under the terms of the subpoena is in no way pertinent to any authorized inquiry.

24. On information and belief, the subpoena was issued against defendant Chemical Bank New York Trust Company rather than directly against the plaintiffs in order to deprive plaintiffs of their rights to protect their private records, such as the sources of their contributions, as they would be entitled to do if the subpoenas had been issued against them directly.

25. The financial support of USSF, which permits it to continue its activities, in furtherance of the welfare of military personnel, is obtained exclusively through contributions of private individuals and foundations. Plaintiffs believe that if the Chemical Bank if forced, under threat of contempt of Congress, to comply with the aforesaid subpoena and provides the sweeping array of documents demanded by the Subcommittee, much of that financial

support will be withdrawn and USSF will be unable to continue its constitutionally protected activities.

26. Unless the enforcement and operation of the subpoena and the Resolutions pursuant to which it was authorized are restrained by this Court, immediate and irreparable harm will be done to the Plaintiffs and to the entire nation by the curbing of freedom of the press and of dissent.

27. No previous application for this relief with respect to the subpoena issued on May 28, 1970 has been made.

28. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. That a permanent injunction issue:

a) Restraining defendant Chemical Bank New York Trust Company from in any way complying by disclosing, revealing or delivering any records, papers, correspondence, statements, checks, deposit slips, supporting documents or microfilm pursuant to any subpoena or subpoenas served upon the said defendant by the Subcommittee on Internal Security of the Committee on The Judiciary of the United States Senate;

b) Restraining defendant Subcommittee members and staff counsel from seeking to enforce the said subpoena by use of the power of contempt of Congress or any other means;

2. That a declaratory judgment issue:

a) Declaring that the aforesaid subpoena is void and illegal under the United States Constitution;

b) That Senate Resolution 366 and 341 are void and illegal under the United States Constitution;

3. For any further relief that this Court may deem appropriate.

Respectfully submitted,

NANCY STEARNS
CARL BROEGE
c/o Center For Constitutional Rights
588 Ninth Avenue
New York, N.Y. 10036

JEREMIAH S. GUTMAN
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N.Y. 10010

PHILIP J. HIRSCHKOP
503 D Street, N.W.
Washington, D.C. 20001
202-347-4466

(VERIFICATION OMITTED)

APPENDIX C(1)(a)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1474-70

UNITED STATES SERVICEMEN'S FUND, *et al.*,
Plaintiffs,

v.

JAMES O. EASTLAND, *et al.*,
Defendants.

ORDER

Upon consideration of defendants James O. Eastland, John L. McClellan, Sam Ervin, Birch Bayh, Thomas J. Dodd, Robert C. Byrd, Strom Thurmond, Marlow W. Cook, Robert P. Griffin, and Hugh Scott's motion to drop parties-

defendants pursuant to Rule 21, Fed. R. Civ. P., it appearing on the record that said defendants are United States Senators, the Court concludes that said defendants are personally immune from suit. *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

Wherefore, it is by the Court this ——— day of August, 1970,

ORDERED that said defendants be and the same hereby are dropped as parties-defendants in this action.

s/ OLIVER GASH
Oliver Gash
Judge

APPENDIX C(1)(b)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES SERVICEMEN'S FUND, *et al.*,
Plaintiffs,

v.

JAMES O. EASTLAND, *et al.*,
Defendants.

ORDER

This cause having come on for hearing on plaintiffs' application for a temporary restraining order and upon consideration of the application and argument of counsel in chambers and it appearing to the Court that this Court lacks subject matter jurisdiction, the plaintiffs lack standing to sue and that plaintiffs failed to demonstrate probability of success on the merits, it is by the Court this 1st day of June, 1970,

ORDERED that plaintiffs' application for a temporary restraining order be and the same hereby is denied.

UNITED STATES DISTRICT JUDGE

APPENDIX C(1)(c)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

Civil Action 1474-70

No. 24,279

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Before: WRIGHT, LEVENTHAL and MACKINNON, Circuit Judges, in Chambers.

ORDER

(Filed June 4, 1970)

This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

It appears, however, that serious constitutional questions are presented by this litigation which require more time than is presently available for proper consideration. *See Stamler* v. *Wills*, 7 Cir., 415 F.2d 1365 (1969). The Second Circuit has, in similar circumstances, involving the same appellees, issued a temporary restraining order in order to assure appropriate consideration by the federal courts in the District of Columbia. *Liberation News Service* v. *Eastland*, 2nd Cir., — F.2d — (No. 34,688, decided April 10, 1970).

In denying temporary relief, the District Court assumed the court entirely lacked jurisdiction. This assumption is doubtful indeed in view of the fact that parties defendant include the cognizant counsel of a committee and the pri-

vate party to whom plaintiffs have entrusted information. *Stamler* v. *Wills, supra; Hearst* v. *Black,* 66 App. D.C. 313, 87 F.2d 68 (1936).

It appears to the court that the issues involved, as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order.

The decisive element in our action to grant a stay is like that which moved the Second Circuit, because unless a stay is granted this case will be mooted, and there is likelihood that irreparable harm will be suffered by appellants, at 10:00 a.m. this morning.

It is ORDERED by the court that the emergency stay requested by appellants be granted until the District Court has an opportunity fully to consider and to act on this matter, and it is

FURTHER ORDERED by the court that consideration of this case be expedited by the District Court.

Judge MacKinnon is of the opinion that the question is not free from doubt but would deny the stay on the record made before the trial court on the grounds that the subpoena was issued for a valid legislative purpose and that the balancing of the legislative power of Congress, including the ancillary power to investigate to determine what legislation may be necessary, against defendants' claimed First Amendment rights, leads to the conclusion that the balance prevails in favor of the governmental interests and that plaintiffs will not prevail on the merits. *Barenblatt* v. *United States,* 360 U.S. 109 (1959).

APPENDIX C(1)(d)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1474-70

UNITED STATES SERVICEMEN'S FUND, ET AL., *Plaintiffs,*

v.

JAMES O. EASTLAND, ET AL., *Defendants.*

MEMORANDUM

I.

This matter is before the Court on plaintiffs' motion for preliminary injunction, and defendants' motion to dismiss the complaint. At a hearing on June 16-17, 1970, testimony was received on plaintiffs' motion for preliminary injunction, and argument was heard on the motion for injunction and defendants' motion to dismiss. Following the hearing, the respective parties submitted supplemental memoranda directed to argument received at the hearing on the respective motions.

Plaintiff contends it is a non-profit organization established for the purpose of furthering the welfare of persons in military service. It provides financial support to "G.I. coffeehouses" (gathering places near military bases where G.I.'s can gather and associate with other persons in and outside of the military), "G.I. newspapers" (newspapers published by and for persons in military service which raise issues of concern to them—including opposition to the war in Vietnam), and civilian legal defense for persons in the military. In addition, the Fund provided entertainment, books, newspapers, and library materials upon request. It is said the Fund exercises no editorial control over newspapers or other activities which it supports, and decisions to fund newspapers are in no respect influenced by the expected nature of the activity.

On April 16, 1970, the Senate Subcommittee on Internal Security (hereafter referred to as the Subcommittee) issued a subpoena duces tecum to the Chemical Bank of New York City requiring the Bank to furnish the Subcommittee with all of the Bank's records relating to the account of the plaintiff. This subpoena was subsequently withdrawn by the Subcommittee because of an error in the precise name of the plaintiff organization in the Resolution authorizing the subpoena. A corrected subpoena was issued, but subsequently withdrawn upon the oral request of plaintifffs. A third subpoena, returnable on June 4, 1970, was then issued. It is this subpoena which plaintiffs challenge in this action.

On June 1, another Judge of this Court denied plaintiffs' motion for a temporary restraining order on the ground that the Court was without subject matter jurisdiction,, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. On June 4, the Court of Appeals issued an Emergency Stay, finding "that the issues involved as to the merits off the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order." *United States Servicemen's Fund, et al.* v. *Eastland*, No. 24,279 (D.C. Cir. June 4, 1970).

Plaintiffs challenge the Subcommittee subpoenas on several grounds. First, they argue that investigation of their organization is not properly within the scope of the Subcommittee Resolution pursuant to which the subpoena was issued. In addition, they assert that there is no valid legislative purpose for the investigation of their organization under the Subcommittee's Charter Senate Resolution 341, and that this Charter Resolution is unduly broad and vague and therefore violates plaintiffs' rights under the First, Fourth, and Fifth Amendments. More specifically, plaintiffs allege that disclosure of their financial contributors which will result from execution of the subpoenas

will deter private citizens and groups from supporting dissenting political views as is their constitutional prerogative.

II. Government's Motion to Dismiss

Defendants have raised four separate arguments in support of their motion to dismiss. They argue: (1) That the defendants in this case are immune from suit; (2) That plaintiffs lack standing to object to the subpoena; (3) That plaintiffs' complaint raises a non-justiciable issue; and (4) That the complaint fails to state a claim upon which relief can be granted.

Defendants' first two grounds merit little discussion. There seems little question that jurisdiction over the person of the Subcommittee counsel defendant Sourwine is present, *Powell* v. *McCormack*, 395 U.S. 486 (1969). Moreover, plaintiffs are the proper parties to raise objections to the subpoenas at issue here, inasmuch as they are the express subject of the investigation. They have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). Plaintiffs are not required to entrust the task of protecting their First Amendment rights to a third party (the Bank) which has little interest in doing so. See *McSurely* v. *McClellan*, No. 23,845 (D.C. Cir. March 26, 1970), Slip Opinion at 8; *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918).

A more serious question is presented by defendants' contention that the complaint does not present a justiciable issue. The Supreme Court only recently restated the criteria governing whether a claim is justiciable. In *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court stated that justiciability encompasses two important considerations. First, the Court must determine whether the issue constitutes a political question. Second, the claim presented and the relief sought must admit of judicial relief.

In *Powell* the Supreme Court concluded that petitioner's challenge to the action of the House of Representatives in excluding him from membership despite the fact that he had been duly elected was not a political question because the power to determine one's qualifications for the House is not "textually committed" to the House of Representatives by the Constitution, and because the Court's determination of the right of Powell to sit required no more than an interpretation of the Constitution of the type in which Courts ordinarily engage. The Court was not engaging in an "initial policy determination of a kind clearly for nonjudicial discretion." In the Court's opinion the same is true of the issues raised in this case.

The more fundamental question in this case is raised under the requirement that the issue admit of judicial relief. In *Powell* the House of Representatives argued that the Court was without power to issue injunctions compelling officers or employees of the House to perform specific official acts. The Court, however, did not have to reach that question. 395 U.S. at 516. In the instant case, however, the power of the Court to issue injunctive relief against a congressional body is squarely presented. Defendants correctly point out that lower federal courts have almost universally felt that "legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936). Thus, courts have consistently refused to restrain anticipatorily congressional bodies from pursuing proposed investigations and, similarly, have been reluctant to order committees of Congress to take any kind of affirmative action. *Pauling* v. *Eastland*, 288 F.2d 126 (D.C. Cir. 1960); *Mins* v. *McCarthy*, 209 F.2d 307 (D.C. Cir. 1953). This practice of restraint was but a manifestation of the respect to be accorded a coordinate branch of government under the doctrine of separation of powers.

Courts did not, however, refrain completely from review of use of the investigative powers of congressional bodies. It is undisputed that courts may, in the context of a criminal prosecution for contempt of Congress, rule on the constitutional proprietary of the investigation from which the charges of contempt arose. The distinction between review in the context of a contempt proceeding and anticipatory restraint of a committee investigation is readily apparent. In the normal situation involving a congressional subpoena, there is little need for a court to grant injunctive relief, for the person or organization to whom the subpoena is directed may avoid the injury which will allegedly be sustained by refusing to respond, and thereafter any objections to the validity of the subpoena may be raised by way of defense to a contempt proceeding, if any is instituted. A federal court is bound to observe the greatest possible respect for Congress consistent with its duty of protecting citizens' constitutional rights. Since a person subjected to a subpoena ordinarily will have an adequate remedy other than injunctive relief, the traditional practice of judicial restraint in this area comports well with the doctrine of separation of powers.

In the present case, however, plaintiffs plainly have no remedy other than injunctive relief, inasmuch as the subpoena is directed to the Chemical Bank rather than to the United States Servicemen's Fund. Thus, the traditional rationale for judicial abstention is inapplicable on the facts of this case. In such circumstances, the Court is unwilling to hold that it is without power to consider the merits of plaintiffs' complaint. *Stamler* v. *Willis*, 415 F.2d 1365 (7th Cir. 1969). By so holding, the Court is not unmindful of the caution which should be observed when passing upon an act of Congress undertaken pursuant to that body's broad investigative power. The interest of Congress in carrying out its legislative function will weigh heavily in the decision on the merits of plaintiffs' complaint and on the merits of their motion for preliminary injunction.

In view of the Court's holding that, on the narrow facts presented here, a justiciable issue is presented, it is unnecessary to reach plaintiffs' argument that the issues raised by their motion for injunction are justiciable under the broader principle enunciated in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). *Cf. Stamler* v. *Willis*, *supra*.

III. Motion for Preliminary Injunction.

A motion for a preliminary injunction requires the Court to exercise its discretion based upon a series of estimates, among which are the relative injuries to the parties, the extent to which the public interest is involved, and the probability of ultimate success or failure of the suit. *Perry* v. *Perry*, 190 F.2d 601 (D.C. Cir. 1951). Consideration of these factors in the context of the case presented, leads the Court to conclude that plaintiffs' motion for a preliminary injunction should be denied.

The probability that plaintiffs will be successful in their suit is of critical importance when the body sought to be restrained is a committee of Congress. As noted earlier, plaintiffs challenge the validity of the subpoena upon several grounds. First, they argue that the subpoena has never been properly authorized, because the Subcommittee Resolution of October 14, 1967, authorized investigation solely into "the activities of the National Conference for New Politics and any organizations and individuals affiliated or associated therewith." Since there was no testimony at the hearing that there ever was or has been any connection between the National Conference for New Politics and United States Servicemen's Fund, and especially since the U.S.S.F. was not organized until some nine months after the National Conference for New Politics was dissolved in April, 1968, plaintiffs contend that there is no authorization for subpoenaing any records concerning the U.S.S.F.

In the Court's opinion, however, the validity of the subpoena is not to be measured by reference to the October

14, 1967, Resolution. Rather, the Resolution of March 11, 1970, authorizes an independent investigation of the U.S.S.F. which merely grew out of evidence gathered in the course of the investigation conducted pursuant to the Resolution of October 14, 1967. Accordingly, plaintiffs' argument that the investigation and subpoena had not in fact been authorized must fail.

Plaintiffs also challenge the subpoena on the ground that the Subcommittee investigation is not being conducted in pursuance of a proper legislative purpose, *Watkins* v. *United States*, 354 U.S. 178 (1957), and that the Subcommittee's charter resolution, Resolution 341, is unconstitutionally vague. The essential language of that Resolution is as follows:

> Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized . . . to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

Plaintiffs assert that the Subcommittee apparently is proceeding with its investigation under Part (3) Resolution 341 and, more specifically, to investigate "infiltration by persons who are or may be under the domination of . . . any . . . movement seeking to overthrow the Government of the United States by force or violence." This very part of the same Resolution, however, has been sustained in the face of a challenge that it is unconstitutionally vague.

Shelton v. *United States*, 280 F.2d 701 (D.C. Cir. 1960), *rev'd on other grounds sub nom. Russell* v. *United States*, 369 U.S. 749 (1962). The Court is not persuaded that subsequent decisions of the Supreme Court cast doubt on the continued validity of the *Shelton* holding. See also *Sacher* v. *United States*, 252 F.2d 828 (D.C. Cir. 1958), *rev'd on other grounds*, 356 U.S. 576 (1958).

Shelton also sheds considerable light on the issue of whether a valid legislative purpose exists for this investigation. There, the Senate Internal Security Subcommittee was conducting an investigation into the extent of communist infiltration into the news media. Shelton, called to testify, refused to answer a question concerning membership in the Communist Party, and, when prosecuted for contempt of Congress, argued, in addition to vagueness, that the investigation violated the Fifth Amendment because it would deter newspapers from hiring persons of unpopular minority views and associations. In finding that the investigation carried a valid legislative purpose, the Court emphasized the importance of a free press to preservation of the Government. Judge (now Chief Justice) Burger said:

> [T]his inquiry was in no sense an investigation into the press as such, but into the question whether the constitutionally guaranteed freedom of the press was being used to undermine that very freedom and the foundation on which it rests. *Barenblatt* authorizes such inquiry. The investigatory power of Congress flows from the right of the Government to preserve itself and its institutions. The important right of the press to be free is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures.

280 F.2d at 707.

The analogy to the present case is apparent. The U.S.S.F. is an organization whose sole focus is on the servicemen of this country. Although there has been no evidence that

any of its activities, or those its supports, have been of a type not protected by the First Amendment, it cannot be denied that Congress has a right to scrutinize closely possible infiltration of subversive elements into an organization which directly affects the armed forces of this country. Just as an investigation into possible abuse of First Amendment rights directed at the undermining of the news media (*Shelton*) or of educational institutions (*Barenblatt*) was held proper, so here investigation into possible abuse of First Amendment rights directed at undermining the nation's armed forces is *a fortiori* a proper subject of legislative inquiry. Congress needn't withhold investigation until infiltration has manifested itself in acts directed toward overthrow of the Government of a type clearly not protected by the First Amendment.

The Court is not unmindful that Congress has no authority to expose the private affairs of individuals without justification in terms of the functions of Congress. *Watkins* v. *United States*, 354 U.S. 178 (1957). *Cf. Boorda* v. *Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969). This is not a case of "exposure for exposure's sake." Furthermore, there is such justification for whatever exposure takes place.

There is the clearly stated constitutional power of Congress "to raise and support armies,"[1] "to make rules for the government and regulation of the land and naval forces" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Arver, et al* v. *United States*, 245 U.S. 366, at 377. This power is not limited to periods of declared war, *Ashwander* v. *T.V.A.*, 297 U.S. 288. In *Barenblatt*, 360 U.S. 109, the Supreme Court recognized the power of Congress to investigate communist influences in the field of education. It is evident that the recognized power of Congress to investigate

[1] Art. I, Sec. 8.

incident to its power to legislate is under these circumstances more clearly established than in *Barenblatt*.

The Court also recognizes that mere presence of a valid legislative purpose does not foreclose plaintiffs' claims to protection from the subpoena. Even assuming a valid purpose, the legislative interest must be weighed against the injury to First Amendment rights which will flow from its execution. *NAACP* v. *Alabama*, 357 U.S. 449 (1958). But plaintiffs' witnesses could do little more than speculate as to the effect that disclosure of their contributors would have. Moreover, several contributors are said to have remained anonymous even from U.S.S.F. officials; manifest disclosure of Bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity. The showing of plaintiffs with respect to the adverse effect on contributors falls far short of establishing the requisite element of a preliminary injunction, namely, irreparable injury. *Virginia Petroleum Jobbers Ass'n.* v. *FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958). In the face of such a strong legislative (and public) interest in the investigation at issue here, plaintiffs' showing of injury to First Amendment rights is insufficient to warrant a finding of probable success at a full trial, *cf. NAACP* v. *Alabama*, *supra*, and, coupled with the validity of the Subcommittee action, certainly is an insufficient basis for granting injunctive relief against a committee of Congress. *Cf. Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

For the foregoing reasons, it is by the Court this 30th day of June, 1970,

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs' motion for preliminary injunction is denied.

/s/ OLIVER GASCH
Oliver Gasch
Judge

APPENDIX C(1)(e)

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1969

Civil Action 1474-70

No. 24,412

UNITED STATES SERVICEMEN'S FUND, ET AL., *Plaintiffs*,

v.

JAMES O. EASTLAND, ET AL.

Before: WRIGHT, LEVENTHAL and MACKINNON,
Circuit Judges, in Chambers

ORDER

On consideration of appellants' motion for an emergency stay and for a hearing, and of appellees' opposition filed with respect thereto, and to afford an opportunity for this Court to consider the motion more fully, it is

ORDERED by the Court that enforcement of and compliance with the subpoena issued by the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate on the Chemical Bank of New York Trust Company for the production of records concerning the account of the United States Servicemen's Fund on May 26, 1970, is stayed pending further order of this Court.

Per Curiam

Judge MacKinnon dissents.

APPENDIX C(1)(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1969

Civil Action 1474-70

No. 24,412

UNITED STATES SERVICEMEN'S FUND, ET AL.,

v.

JAMES O. EASTLAND, ET AL.

Before: WRIGHT, LEVENTHAL, and MACKINNON, Judges, in Chambers

ORDER

(Filed July 28, 1970)

This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

The stay granted by the Court on July 2, 1970, requires expeditious disposition of this case. Since the calendar for the September sitting of this Court has already been prepared and assigned, the case is hereby assigned to the October sitting. This will obviate the delay which would have been involved if the Clerk had followed the standard practice of including in the calendaring for the October sitting only those cases for which briefs had been filed prior to the date of preparation of the calendar.

It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d, 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler* 38 U.S.L.W. 3522 (June 30, 1972). It would therefore be in the interest of justice if the case could

proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules. By expedition of that appeal and consolidation with the instant appeal, it may be possible both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge.

Per Curiam

MacKinnon, Circuit Judge: I would refuse to grant a further stay and would affirm the District Court on the ground principally that appellants are not likely to succeed on the merits. For this reason, I also conclude that mooting the case will not cause them irreparable injury. Appellants are seeking to establish a privileged status not provided for by the law. Furthermore, the names of contributors to such activities is a matter of vital concern to Congress; and within its power to investigate, and it should not be further frustrated in its proper efforts to get on with its business of legislating with respect to the evils created thereby, if investigation confirms same.

APPENDIX C(1)(g)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Civil Action 1474-70

UNITED STATES SERVICEMEN'S FUND, ET AL., *Plaintiffs*,

v.

JAMES O. EASTLAND, ET AL., *Defendants*.

MEMORANDUM

This matter comes before the Court on plaintiffs' motions for permanent injunction and to compel the taking of further depositions and defendants' opposition thereto.

Plaintiff contends it is a non-profit organization established for the purpose of furthering the welfare of persons in military service. It provides financial support to "G.I. coffeehouses" (gathering places near military bases where G.I.'s can associate with persons both in and outside of the military), "G.I. newspapers" (newspapers published by and for persons in military service which raise issues of concern to them—including opposition to the war in Vietnam), and civilian legal defense for persons in the military. In addition, the Fund has provided entertainment, books, newspapers, and library materials upon request. The record as to the precise nature of the material in question is somewhat vague, with references to "tapes of Malcolm X" and "political literature" serving as the most specific descriptions of the types of material provided by the Fund. It is said, however, the Fund exercises no editorial control over newspapers or other activities which it supports, and decisions to fund newspapers are in no respect influenced by the expected nature of the activity.

On April 16, 1970, the Senate Subcommittee on Internal Security (hereafter referred to as the Subcommittee) issued a subpoena duces tecum to the Chemical Bank of New York City requiring the Bank to furnish the Subcommittee with all of the Bank's records relating to the amount of the plaintiff. This subpoena was subsequently withdrawn by the Subcommittee because of an error in the precise name of the plaintiff organization in the Resolution authorizing the subpoena. A corrected subpoena was issued, but subsequently withdrawn upon the oral request of plaintiffs. A third subpoena, returnable on June 4, 1970, was then issued. It is this subpoena which plaintiffs challenge.

On June 1, another Judge of this Court denied plaintiffs' motion for a temporary restraining order on the ground that the Court was without subject matter jurisdiction, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. On June 4, the Court of Appeals issued an Emergency Stay, finding "that the issues involved as to the merits of the

case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order." *United States Servicemen's Fund, et al.* v. *Eastland*, No. 24,279 (D.C. Cir. June 4, 1970). Accordingly, a hearing was held June 16 and 17, 1970, and this Court denied preliminary injunction in a memorandum opinion of June 30, 1970. The Court of Appeals issued an emergency stay on July 2, 1970, which was extended on July 28, 1970. An order was then issued dismissing defendant Eastland as a party-defendant and staying depositions to allow the United States Senate to authorize the testimony of defendant Sourwine as Chief Counsel to the Senate Subcommittee on Internal Security. On October 14, 1970, the Senate passed S. Res. 478 which authorized defendant Sourwine to testify only as to those matters of public record. Pretrial depositions were conducted on November 18, 1970, wherein defendant Sourwine limited his answers to the proscriptions of S. Res. 478. Plaintiffs then moved this Court to compel further testimony and production of certain legislative documents. On February 23, 1971, a hearing was conducted on the motion for permanent injunction.

There are, thus, two questions presented for determination. First, whether plaintiffs are entitled to a permanent injunction and second, whether defendant Sourwine can be compelled to give testimony beyond the limitations imposed by S. Res. 478. It is the opinion of this Court that the answers to both are in the negative.

In their memorandum in support of permanent injunction plaintiffs once again contend that the Subcommittee's investigatory mandate is vague in violation of the First and Fifth Amendments and that the investigation in question has not been conducted pursuant to a proper legislative purpose and, therefore, the investigation and the subpoena issued pursuant thereto are violative of the First and Fifth Amendments. As neither the hearings on the motion nor

the supporting briefs raise new material matter, the Court relies on its memorandum of June 30, 1970, in which these issues are fully discussed, and finds no violation of the First or Fifth Amendments.

As to the discovery question, while the Court is mindful that the doctrine of legislative immunity is less absolute when applied to employees of legislative bodies rather than to legislators themselves,[1] there has been no reference to, nor has the Court been able to find, authority for the proposition that a legislative employee's vulnerability to suit requires this Court to afford complete satisfaction of plaintiffs' discovery requests when such discovery is specifically barred by a Senate resolution. As to the merits of plaintiffs' specific discovery requests, Rule 26 of the Federal Rules of Civil Procedure, which sets forth the general provisions governing discovery, provides in Subsection 26(b)(1) that parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action. The testimony of defendant Sourwine which plaintiffs ask the Court to compel and the documents which the plaintiffs ask the Court to order produced are privileged. It is clear, and the plaintiffs do not otherwise contend, that the information sought from the defendant has been received by him pursuant to his official duties as a staff employee of the Senate or from the documents under the control of and in the possession of the United States Senate. As such, the information is within the privilege of the Senate and subject to a claim of privilege by that body. *Senate Rule 301, Senate Manual, Senate Document No. 1 of the 90th Congress, First Session.* See also, *Senate Procedure*, Senate Document No. 44, 88th Congress, First Session, p. 272, 275; Cannon *Precedents of the House of Representatives*, Vol. VI, Sec. 585-588. Moreover, as these same authorities well demonstrate, the privileged character of the documents is, likewise, clear. These documents are the records of the United States Senate, they are not records under the possession, custody or control of an individual Senate Staff member. The United States Senate made a timely and appropriate claim of its privilege as it relates to the testimony of the defendant and to the production of the requested documents[2] and the testimony and the documents do *not* constitute matter not privileged within Rule 26.

[1] *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

As such, and in light of this Court's desire not to interfere with the proper activity of a co-ordinate branch of government, plaintiffs' motions for permanent injunction and to compel further depositions are hereby denied.

/s/ Oliver Gasch
Judge

Date October 21, 1971

APPENDIX C(2)(a)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1609

Progressive Labor Party, et al., *Plaintiffs-Appellees*

v.

Committee on Internal Security of the United States House of Representatives, et al., *Defendants-Appellants*

PRELIMINARY INJUNCTION

(Filed April 29, 1971)

This cause came before the Court on the 26th day of April 1971, upon plaintiffs' application for equitable relief; counsel for plaintiffs and Benjamin C. Flannagan, Esq.

[2] Moreover, it is well settled that a person cannot be compelled to produce a document which is neither in his possession or under his control. *In re Rivera*, 79 F.Supp. 510, 511 (S.D.N.Y.), *Bough* v. *Lee*, 29 F.Supp. 498, 501 (S.D.N.Y.); In Re Harris, 27 F.Supp. 480, 481 (S.D.N.Y.).

Attorney, United States Department of Justice, having personally appeared before the Court and counsel for The Amalgamated Bank having noted on this order that the bank has no objection to its issuance; and relying upon current orders of the United States Court of Appeals for the District of Columbia Circuit entered in *United States Servicemen's Fund* v. *Eastland*, No. 24,279 (Civil 1474-70), it is

ORDERED that, pending the decision of the United States District Court in *United States Servicemen's Fund* v. *Eastland*, Civil 1474-70, The Amalgamated Bank be and it hereby is preliminarily enjoined from complying with so much of the subpoenas issued on April 13, 1971, copies of which are annexed hereto as Exhibits 1A, 1B, and 1C and which are to be read as a part hereof, as require the bank to produce "current checks deposited to the [plaintiffs'] accounts" and "any available previous checks deposited to the accounts;" provided, however, that nothing contained herein shall be deemed to restrain the Amalgamated Bank from complying with the remainder of the subpoenas at issue herein; and it is

FURTHER ORDERED, that personal service of a copy of this order forthwith on Benjamin C. Flannagan, Esq. and Arthur Gussaroff, Esq., shall be due and sufficient service of this order.

4/29/71

/s/ George L. Hart, Jr.
United States District Judge

ENDORSEMENT OF COUNSEL

The Amalgamated Bank has no objection to the issuance of the above order.

APPENDIX C(3)(a)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL.,
Plaintiffs-Appellees

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Defendants-Appellants*

PRELIMINARY INJUNCTION

(Filed May 21, 1971)

This cause came before the Court on the 21st day of May 1971, upon plaintiffs' application for equitable relief; counsel for plaintiffs and Benjamin C. Flannagan, Esq., Attorney, United States Department of Justice, having personally appeared before the Court and Public National Bank having, by praecipe filed by plaintiffs' counsel indicated that the bank has no objection to the issuance of this Order; and relying upon current orders of the United States Court of Appeals for the District of Columbia Circuit entered in *United States Servicemen's Fund* v. *Eastland*, No. 24,279 (Civil 1474-70), it is

ORDERED that, pending the decision of the United States District Court in *United States Servicemen's Fund* v. *Eastland*, Civil 1474-70, Public National Bank be and it hereby is preliminarily enjoined from complying with so much of the subpoena issued on May 12, 1971, a copy of which, as furnished plaintiff by Public National Bank, is annexed hereto as Exhibit 1 and which is to be read as a part hereof, as requires the bank to produce "current checks deposited to the accounts" and "any available checks drawn or deposited to the account" by delivery of any such checks or microfilm or other copies thereof; pro-

vided, however, that nothing contained herein shall be deemed to restrain the Public National Bank from complying with the remainder of the subpoena at issue herein; and it is

FURTHER ORDERED that the Public National Bank shall immediately, upon being served with any additional subpoena or subpoenas issued by defendant Committee, notify plaintiff National Peace Action Coalition and plaintiff's attorney, Jeremiah S. Gutman at 363 - 7th Avenue, New York, New York 10001, of the service thereof; and it is

FURTHER ORDERED that personal service of a copy of this order forthwith upon Benjamin C. Flannagan, Esq., and upon Anthony F. Fullerton, Vice President and Cashier of Public National Bank, at 1430 K Street, N W., Washington, D. C. 20005, shall be due and sufficient service of this order.

/s/ Wm. B. Jones
United States District Judge

Dated: May 21, 1971

APPENDIX C(3)(b)

SECOND PRELIMINARY INJUNCTION

(Filed May 28, 1971)

This case came before the Court on the 28th day of May, 1971, upon plaintiffs' application for equitable relief; counsel for plaintiffs and Benjamin C. Flannagan, Attorney United States Department of Justice, having personally appeared before the Court and Public National Bank having, by praecipe filed by plaintiffs' counsel, indicated that the bank has no objection to the issuance of this Order; and relying upon current orders of the United States Court of Appeals for the District of Columbia Circuit entered in *United States Servicemen's Fund* v. *Eastland*, No. 24,279 (Civil 1474-70);

And further a preliminary injunction having been entered on May 21, 1971 (1) preliminarily enjoining defendant Public National Bank from complying with so much of the subpoena issued on May 12, 1971, as required the bank to produce "current checks deposited to the accounts" and "any available checks drawn or deposited to the account" by delivery of any such checks or microfilm or other copies thereof; provided, that nothing contained therein was to be deemed to restrain the Public National Bank from complying with the remainder of that subpoena and (2) further ordering the Public National Bank immediately upon being served with any additional subpoena or subpoenas issued by the defendant Committee, to notify plaintiff National Peace Action Coalition, and plaintiff's attorney, of the service thereof;

And further the defendant Public National Bank having notified the plaintiffs by letter of May 26, 1971 of the service of an additional subpoena dated May 18, 1971; it is

ORDERED that, pending the decision of the United States District Court in *United States Servicemen's Fund* v. *Eastland*, Civil No. 1474-70, Public National Bank be and it hereby is preliminarily enjoined from complying with so much of subpoena issued on May 18, 1971, a copy of which, as furnished plaintiffs by Public National Bank, is annexed hereto as Exhibit 1 and which is to be read as a part hereof, as requires the bank to produce "current checks" and "any available incoming or outgoing previous checks" by delivery of any such checks or microfilm or other copies thereof; provided, however, that nothing contained herein shall be deemed to restrain the Public National Bank from complying with the remainder of the subpoena at issue herein; and it is

FURTHER ORDERED that the Public National Bank shall, immediately upon being served with any additional subpoena or subpoenas issued by defendant Committee, notify plaintiff National Peace Action Coalition and plain-

tiff's attorney, Jeremiah S. Gutman at 363 7th Avenue, New York, New York 10001, of the service thereof; and it is

FURTHER ORDERED that personal service of a copy of this order forthwith upon Benjamin C. Flannagan, Esq., and upon Anthony F. Fullerton, Vice President and Cashier of Public National Bank, at 1430 K Street, N.W., Washington, D.C. 20005, shall be due and sufficient service of this order.

/s/ Wm. B. Jones
United States District Judge

Dated: May 28, 1971

APPENDIX C(4)(a)

PRELIMINARY INJUNCTION

(Filed May 28, 1971)

This cause came before the Court on the 28th day of May, 1971, upon plaintiff's application for equitable relief; counsel for plaintiffs and Benjamin C. Flannagan, Esq., Attorney, United States Department of Justice, having personally appeared before the Court and Public National Bank having, by praecipe filed by plaintiffs' counsel indicated that the bank has no objection to the issuance of this Order; and relying upon current orders of the United States Court of Appeals for the District of Columbia Circuit entered in *United States Servicemen's Fund* v. *Eastland*, No. 24,279 (Civil 1474-71), it is

ORDERED that, pending the decision of the United States District Court in *United States Servicemen's Fund* v. *Eastland*, Civil 1474-70, Public National Bank be and it hereby is preliminarily enjoined from complying with so much of the subpoenas issued on May 12, 1971 and May 18, 1971, copies of which as furnished plaintiff by Public National Bank, are annexed hereto as Exhibits 1 and 2, which are to be read as a part thereof, as require the bank to produce respectively "current checks deposited to the accounts" and "any available checks drawn or deposited to the account" and "current checks" and "any available incoming or outgoing previous checks" by delivery of any such checks or microfilm or other copies thereof; provided, however, that nothing contained herein shall be deemed to restrain the Public National Bank from complying with the remainder of the subpoenas at issue herein; and it is

FURTHER ORDERED that the Public National Bank shall immediately, upon being served with any additional subpoena or subpoenas issued by defendant Committee, notify plaintiff Peoples Coalition for Peace and Justice and plaintiff's attorney Jeremiah S. Gutman at 363 Seventh Avenue, New York, New York 10001, of the service thereof; and it is

FURTHER ORDERED that personal service of a copy of this order forthwith upon Benjamin C. Flannagan, Esq., and upon Anthony F. Fullerton, Vice President and Cashier of Public National Bank, at 1430 K Street, N.W., Washington, D.C. 20005, shall be due and sufficient service of this order.

/s/ Wm. B. Jones
United States District Judge

Dated: May 28, 1971

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,279, 24,412, 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL,
Appellants

v.

JAMES O. EASTLAND, ET AL

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL,
Appellants

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL,
Appellants

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Appellants

Appeals from the United States District Court
for the District of Columbia

Decided August 30, 1973

Nancy Stearns and *Jeremiah S. Gutman* with whom *Philip J. Hirschkop* were on the brief, for appellants in No. 24,279, 24,412 and 71-2034.

Robert L. Keuch, Attorney, Department of Justice with whom *Richard S. Stolker*, Attorney, Department of Justice were on the brief, for appellees in No. 24,279, 24,412 and 71-2034. *Benjamin C. Flannagan*, Attorney, Department of Justice also entered an appearance for appellee in No. 24,279.

Robert L. Keuch, Attorney, Department of Justice with whom *Garvin Lee Oliver*, Attorney, Department of Justice was on the brief, for appellants in No. 71-1609, 71-1693, and 71-1717. *Benjamin C. Flannagan*, Attorney, Department of Justice also entered an appearance for appellants in No. 71-1609, 71-1693 and 71-1717.

Burt Neuborne of the Court of Appeals of New York with whom *Jeremiah S. Gutman* and *Hope Eastman* were on the brief, for appellees in No. 71-1609, 71-1693, and 71-1717.

Before BAZELON, *Chief Judge*, TUTTLE,* *Senior Circuit Judge* for the Fifth Circuit, and MACKINNON, *Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TUTTLE.

Dissenting opinion filed by *Circuit Judge* MACKINNON at p. 37.

TUTTLE, *Circuit Judge*: This case, combined for argument and consideration on appeal with cases numbered 71-1609, 71-1693 and 71-1717, presents the court with the task of deciding a fundamental consititional question of grave import to which the Supreme Court has not yet given an explicit answer. The question is: Have the courts of the United States the power to interfere with the subpoena power as exercised by committees of the United States Senate and House of Representatives when the exercise of such power threatens a deprivation of First Amendment rights of freedom of association which can be vindicated in no way other than by court decree?

This difficult question comes to this court by appeal from denial of an injunction by the trial court. It is an action by United States Servicemen's Fund, et al., v. Eastland, et al., chairman, members and counsel for the Sub-Committee on Internal Security of the Committee of the Judiciary of the United States Senate and the Chemical Bank New York Trust Company. The history of the litigation and its origins, so far as necessary to our consideration of the issues on appeal follows:

On May 28, 1970, there issued over the signature of Honorable James O. Eastland, Chairman, Committee on the Judiciary and Sub-Committee on Internal Security of the United States Senate a subpoena directed to Chemical Bank in New York City commanding it to bring to the Sub-Committee

*Sitting by designation pursuant to 28 U.S.C. §294(d).

on Internal Security on June 4, 1970, at the committee room, 2300 New Senate Office Building, Washington, D.C., at 10 o'clock a.m.

> "pursuant to S. Res. 366, 81st Congress – 2d, as amended and extended, and S. Res. 341, agreed to February 16, 1970, any and all records pertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce."

On or about June 1, 1970, a complaint was filed by USSF against the stated defendants and an application for temporary restraining order prohibiting the execution of the subpoena was filed with the United States District Court for the District of Columbia. The plaintiffs asserted that they were a non-profit, tax-exempt membership corporation to further the welfare of persons who have served or are presently serving in the military.[1]

[1] A fuller description of the activites and purposes of the plaintiff organization, which are not now challenged, are described in the complaint as follows:

"United States Servicemen's Fund (hereinafter, USSF) is a non-profit tax-exempt membership corporation incorporated in the State of Delaware to further the welfare of persons who have served or are presently serving in the military. Among its charitable, educational and legal purposes and powers as stated in its certificate of incorporation are the following:

> 1) to stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:
> 2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;
> 3) Executing, sponsoring and encouraging research designed to improve the general welfare of military personnel;
> 4) Contributing to the costs of legal representation of military personnel;

The challenge to the validity of the subpoena included an attack on the overbreadth of Resolutions 366 and 341, the vagueness and ambiguity of such resolutions and that the subpoena issued under the resolutions

> "violates plaintiffs' rights under the United States Constitution and particular their rights of privacy and their rights of freedom of speech, freedom of press, freedom of association and freedom from unreasonable search and seizure as guaranteed by the First, Fourth, Fifth, Ninth and Tenth Amendments."

The petition also alleged on information and belief that the subpoena was issued against the defendant, Chemical Bank New York Trust Company, rather than directly against the plaintiffs in order to deprive plaintiffs of their rights to protect their private records, such as the sources of their contributions, as they would be entitled to do if the subpoenas had been issued against them directly. It further alleged

> 5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;
> 6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life.

In furtherance of these purposes USSF provides funds for (a) the establishment and operation of coffee houses, which are gathering places, and places of recreation for persons in military service as well as the providing of entertainers for military personnel; (b) the establishment and operation of newspapers which provide information particularly of interest to military personnel; (c) the supplying of educational materials such as films, books periodicals, and entire libraries for military personnel; (d) the providing of civilian legal representation for military personnel due to the inadequacies of military justice.

Both the G.I. coffee houses and newspapers have become the focus of dissent and expressions of opposition within the military toward the war in Vietnam and now Cambodia, and are frequent targets of repressive actions by both civilian and military authorities seeking to silence dissent. All of the activities of USSF are conducted in exercise of its rights under the United States Constitution and particularly the First Amendment guarantees of Freedom of speech, press and association."

"the financial support of USSF, which permits it to continue its activities, in furtherance of the welfare of military personnel, is obtained exclusively through contributions of private individuals and foundations. Plaintiffs believe that if the Chemical Bank is forced, under a threat of contempt of Congress, to comply with the aforesaid subpoena and provide a sweeping array of documents demanded by the Sub-Committee, much of that financial support will be withdrawn and USSF will be unable to continue its constitutionally protected activities."

The petition finally alleged

"unless the enforcement and operation of the subpoena and the resolutions pursuant to which it was authorized are restrained by this court, immediate and irreparable harm will be done to the plaintiffs and to the entire nation by the curbing of freedom of the press and of dissent."

The complaint prayed for a permanent injunction restraining the bank from complying with the subpoena by in any way "disclosing, revealing or delivering any records, papers, correspondence, statements, checks, deposit slips, supporting documents or microfilm" to the committee; and restraining defendant Sub-Committee members and staff counsel from seeking to enforce the said subpoena by use of the power of contempt of Congress or any other means. It also sought a declaratory judgment holding that the aforesaid subpoena is void and illegal under the United States Constitution and that Senate Resolution 366 and 341 are void and illegal under the United States Constitution.

The case having come on for hearing on plaintiffs' application for temporary restraining order the trial court stated

"upon consideration of the application and argument of counsel in chambers and it appearing to the court that this court lacks subject matter jurisdiction, the plaintiffs lack standing to sue, and that plaintiffs failed to

demonstrate probability of success on the merits, it is by the court this first day of June, 1970, ORDERED that plaintiffs' application for a temporary restraining order be, and the same is, hereby denied."

Thereafter, application was then made to this court for a stay in the enforcement of the subpoenas and this court, Judge MacKinnon dissenting, entered the following order:

"This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

It appears, however, that serious constitutional questions are presented by this litigation which require more time than is presently available for proper consideration. *See Stamler* v. *Willis*, 7 Cir., 415 F.2d 1365 (1969). The Second Circuit has, in similar circumstances, involving the same appellees, issued a temporary restraining order in order to assure appropriate consideration by the federal courts in the District of Columbia. *Liberation News Service* v. *Eastland*, 2 Cir., ___ F.2d ___ (No. 34,688, decided April 10, 1970).

In denying temporary relief, the District Court assumed the court entirely lacked jurisdiction. This assumption is doubtful indeed in view of the fact that parties defendant include the cognizant counsel of a committee and the private party to whom plaintiffs have entrusted information. *Stamler* v. *Willis, supra; Hearst* v. *Black*, 66 App.D.C. 313, 87 F.2d 68 (1936).

It appears to the court that the issues involved, as to the merits of the case, are of such significance that they require at least the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction, as contrasted with a mere temporary restraining order.

The decisive element in our action to grant a stay is like that which moved the Second Circuit, because unless a stay is granted this case will be mooted, and there is likelihood, that irreparable harm will be suffered by appellants, at 10:00 a.m. this morning.

It is ORDERED by the court that the emergency stay requested by appellants be granted until the District Court has an opportunity fully to consider and to act on this matter, and it is

FURTHER ORDERED by the court that consideration of this case be expedited by the District Court.

Judge MacKinnon is of the opinion that the question is not free from doubt but would deny the stay on the record made before the trial court on the grounds that the subpoena was issued for a valid legislative purpose and that the balancing of the legislative power of Congress, including the ancillary power to investigate to determine what legislation may be necessary, against defendants' claimed First Amendment rights, leads to the conclusion that the balance prevails in favor of the governmental interest and that plaintiffs will not prevail on the merits. *Barenblatt* v. *United States*, 360 U.S. 109 (1959)."

Responding to that part of this court's order that consideration of this case be expedited by the district court, the trial court held a hearing on the motion for preliminary injunction promptly thereafter and entered its order denying the injunction on June 30, 1970. By the same order the trial court denied the defendant's motion to dismiss the complaint.

Thereafter an order of this court stayed enforcement of the subpoena until final disposition of the case on appeal, but recommended that in the meantime the case go to final judgment in the district court. For convenient reference, this order, together with the dissent, is here set out:

No. 24,412

United States Servicemen's Fund, et al.

v.

James O. Eastland, et al.

Before: Wright, Leventhal, and Mackinnon, Circuit Judges, in Chambers.

ORDER

"This court accords deference to the committees of Congress, a coordinate branch of the Government, and to their authority to conduct investigations and to subpoena witnesses and records in connection with their investigations.

The stay granted by the Court on July 2, 1970, requires expeditious disposition of this case. Since the calendar for the September sitting of this Court has already been prepared and assigned, the case is hereby assigned to the October sitting. This will obviate the delay which would have been involved if the Clerk had followed the standard practice of including in the calendaring for the October sitting only those cases for which briefs had been filed prior to the date of preparation of the calendar.

It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler*, 38 U.S.L.W. 3522 (June 30, 1970). It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules. By expeditionof that appeal and consolidation with the instant appeal, it may be possible both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge.

Per Curiam

MacKinnon, Circuit Judge: I would refuse to grant a further stay and would affirm the District Court on the ground principally that appellants are not likely to succeed on the merits. For this reason, I also conclude that mooting the case will not cause them irreparable injury. Appellants are seeking to establish a privileged status not provided for by the law. Furthermore, the names of contributors to such activities is a matter of

vital concern to Congress; and within its power to investigate, and it should not be further frustrated in its proper effort to get on with its business of legislating with respect to the evils created thereby, if investigation confirms same."

Upon motion of the defendants who are United States Senators the trial court, although having theretofore overruled a motion to dismiss, ordered that the defendants who were Senators should be dropped as parties defendant, the court stating

"it appearing on the record that said defendants are United States Senators, the court concludes that said defendants are personally immune from suit. Dombrowski v. Eastland, 387 U.S. 82 (1967)."

Thereafter, on February 23, 1971, the trial court held a hearing on the motion for permanent injunction and on plaintiffs' motion for compelling the testimony of defendant Sourwine, counsel for the committee. The court denied both the injunction and the application for taking of the committee counsel's testimony by its order of October 21, 1971.

This final order was then appealed and the appeal was combined with the pending appeal from the denial of preliminary injunction. The appellants here, the plaintiffs below, complain of (1) the denial of a preliminary injunction, (2) the dismissal of the members of the Sub-Committee on Internal Security as parties defendant, (3) the denial of an order compelling the testimony of defendant Sourwine, and (4) the denial of a permanent injunction.

The appellees, represented by the Department of Justice, state their contention in several "issues" which may be compressed into the following: (1) Do plaintiffs have standing to enjoin the execution of this subpoena when issued to a third party bank which has exclusive possession, custody and

control of such records; (2) Do plaintiffs in the exercise of their First Amendment rights to association have standing to enjoin "an investigation being conducted by a congressional sub-committee";[2] (3) Does this complaint seeking relief against United States Senators in their official capacity and against staff counsel state a case or controversy within the meaning of Article III, Section 2 of the Constitution; (4) Assuming jurisdiction, which is challenged, should a federal court, pursuant to the doctrine of separation of powers, and as a matter of judicial restraint, abstain from exercising that jurisdiction "by enjoining the execution of a validly authorized subpoena duces tecum" under the facts of this case; (5) Is the Senate Resolution authorizing this Sub-Committee's investigation unconstitutionally vague or overbroad; (6) May a federal court refuse to enjoin a congressional investigation where plaintiffs failed to demonstrate a threat of irreparable injury sufficient to outweigh the legislative interest in conducting that investigation; (7) May a federal court refuse to compel an attorney employed by the legislative branch of the government to testify as to matters within the possession and control of the Congress which relate to the underlying basis for a congressional investigation and as to which the Congress has asserted its privilege of legislative immunity.

The defendants, of course, assert that the trial court erred in not dismissing the complaint. In other words, they take the position that, even though all of the allegations in the complaint were to be taken as true, the United States District Court did not have, or should not exercise, jurisdiction because of what must be construed to be an assertion of absolute legislative immunity so long as the actions engaged in

[2] It is clear that these plaintiffs do not seek to enjoin the investigation being conducted by the Internal Security Committee. They seek only to enjoin the enforcement of this particular subpoena.

by the members of the committee and its counsel occurred during the course of valid legislative investigatory proceeding.

Before dealing with the several specific grounds upon which the parties rely we think it appropriate to make plain a fundamental principle which this court has uniformly recognized as of critical significance in cases such as this, in which the courts are asked to intervene to prevent an alleged deprivation of the complaining parties' constitutional rights by actions undertaken by one of the Houses of the United States Congress or by a committee or sub-committee thereof. This principle was stated in Hutcheson v. United States, 369 U.S. 599, 622:

> "In conclusion, it is appropriate to observe that just as the Constitution forbids the Congress to enter fields reserved to the executive and judiciary, it imposes on the judiciary the reciprocal duty of not lightly interfereing with Congress' exercise of its legitimate powers."

The principle is restated by this court in Ansara v. Eastland, 442 F.2d 751 (D.C. Cir., 1971) where, at page 753, this court said

> "First, the plaintiffs seek relief that would precede and seek to relate to the conduct of a future legislative hearing. The courts avoid use of extraordinary remedies that involve 'needless friction' with a coordinate branch of the government."

Citing Railroad Commission v. Pullman Co., 312 U.S. 496, 500, 61 S. Ct. 643, 85 L. Ed 971 (1941); Davis v. Ichord, 442 F.2d 1207 (August 20, 1970). More recently in Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972) at page 902 this court said

> "the judiciary has the duty 'of not lightly interfering with Congress' exercise of its legitimate powers' Hutcheson v. United States, 369 U.S. at 622, 82 S. Ct. at 1017. We recently discussed this duty at some length in Ansara v. Eastland, supra."

This fundamental doctrine has resulted in many courts staying their hand when equitable relief was sought by plaintiffs who alleged that pending or threatened actions by committees of Congress would result in a violation of their constitutional rights (most frequently First Amendment rights). See, in addition to the cases cited, Cole v. McClellan, 439 F.2d 534 (D.C. Cir., 1970).

Were the present case cast in the mold of those in which this court has declined to grant equitable relief to prevent threatened congressional action which assertedly would be a deprivation of the plaintiffs' First Amendment rights, we would, of course, be bound by these decisions and we would, moreover, agree that the basic principle which stayed the hand of the court was one which may be properly invoked in every case in which full relief can be granted to the complaining party in some manner other than through the equitable powers of the court. Concluding, as we do, that this case differs in fact from those which have been discussed in that none of the means by which the plaintiffs' constitutional rights can be vindicated, which existed in all of the previous cases, are here present, we are compelled to face the stark issue: Has the court the power, either by injunction or declaratory judgment, to stay the issuance, service on, or enforcement against, a third party of a subpoena authorized by a congressional committee (whether constitutionally valid or not) when a failure to do so would in and of itself result in a serious deprivation of the right of free speech and assembly guaranteed by the First Amendment?

The critically important factual posture of this case which distinguishes it from those in which this court has heretofore denied injunctive relief is apparent. The importance of the distinction is clearly indicated in Sanders v. McClellan, supra. In that case the plaintiff sought to have the district court enjoin the enforcement of a subpoena *duces tecum* issued to

him. The basis for the relief sought was that a compliance with the subpoena by Sanders would result in publication to the world of the names of certain writers for his magazine, which forced involuntary disclosure was claimed by him to be prohibited by the First Amendment. The court made a painstaking analysis of the competing rights of the Congress to legislate, including the right to conduct committee investigations relevant to the legislative purpose, and the right to freedom of association and of the press which the court held to be a protected right.

In Sanders we recognized that the restraint on the courts, vis a vis the legislative branch, prohibits the court from intervening "prematurely or unnecessarily." The court clearly implied that the restraint on the courts was not absolute any more than was the First Amendment right absolute. We recognized that the competing interests in the Sanders case could be harmonized because Sanders could test the validity of his claim to freedom from interference with his First Amendment rights by simply refusing to honor the subpoena; by then undertaking to convince the committee of the rightness of his constitutional stand; then, if unsuccessful, appealing to the Senate, which, in the end must vote a contempt citation; or, still being unsuccessful, seek to convince the executive (the attorney-general's representative) not to prosecute; or, ultimately, if still unsuccessful, and, if tried, stand on his constitutional rights in the trial court and thereafter on appeal.

This court in Ansara, supra, carefully explained its denial of an injunction pending appeal. In a case in which the subpoenas *duces tecum* were served directly on the persons claiming their First Amendment rights the court decided that it should not create "needless friction" by interfering with the committee's action when Ansara, et. al., could accomplish the same result result by contesting the subpoena and subjecting themselves to possible contempt proceedings. The court said:

> "...we first note that the plaintiffs will have an opportunity to present their constitutional objections to the Sub-Committee. Hence the case is to be distinguished, as government counsel points out, from one where plaintiffs were not subpoenaned and would have no way to claim their constitutional protections at the time of committee's questioning."

In both of these cases there was strongly implicit the inference that but for the other means available to the plaintiffs to prevent the loss of their First Amendment rights the court would, of necessity, have viewed the two cases quite differently. Not only is this implicit from the court's statement, quoted above, but it appears from the language of the court in Ansara that government counsel also sought to point out the distinguishing characteristics when the court had before it a case in which a refusal to intervene before execution of the subpoenae would not of itself amount to a denial of the plaintiffs' rights.

Here, in this case, we have the case which is distinghished by this court in both Sanders and Ansara and apparently by the government in its argument in the latter case. *Here the plaintiffs have no alternative means to vindicate their rights.* They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.

SUBJECT MATTER JURISDICTION

The trial court determined that it had subject matter jurisdiction in this case. In doing so it recognized the distinction between determining whether a federal court has "jurisdiction of the subject matter," and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." See Powell v. McCormack, 395 U.S. 486, 512,

where the Supreme Court made reference to the distinction drawn in Baker v. Carr, 369 U.S. 186, 198 (1962). In Baker v. Carr, the Supreme Court enunciated two aspects of subject matter jurisdiction relevant to this case: (1) does it fall within the "case or controversy" restriction of Article III, Section 2, and (2) if so, has Congress exercised its power to assign jurisdiction to the Federal District Courts? In light of the treatment given cases in which relief was denied, but as to which this court has entertained jurisdiction, we think there is no doubt but that the district court had subject matter jurisdiction. See Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972) and Ansara v. Eastland, supra. A suit brought by one whose constitutional rights are allegedly violated is certainly a "case or controversy" in the Article III sense, and the fact that plaintiffs claim that their First Amendment rights were violated in an amount exceeding $10,000 brings this dispute within the purview of 28 U.S.C. § 1331:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States."

The defendants, as a subsidiary argument as to want of jurisdiction, contend that USSF lacked standing to bring the action because they do not meet the requirement that they show

> "such a personal stake in the outcome of the controversy as to assure that concrete adverseness, which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

They also claim that

> "there is nothing whatever to demonstrate that appellants are aggrieved parties by virtue of direct injury, or that they have the necessary stake in the challenged subpoena to satisfy the 'case' or 'controversy' requirements of Article III, Section 2 of the Constitution."

This they contend results from the fact that the subpoena was not directed to appellants, but to a third party commercial bank. This is a makeweight argument at best. If the forced disclosure of the information concerning contributors to and membership in the appellant association violates its First Amendment rights, then it is too clearly an aggrieved person when a third person is under compulsion by the defendants to disclose this information to warrant discussion. If there were otherwise any doubt on this score it has certainly been resolved by Pollard v. Roberts, 393 U.S. 14 (1968), affirming the judgment of a three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968). That court enjoined a state prosecuting officer from subpoenaing party records of the Republican party of the state of Arkansas over the objection that the execution of the subpoena would result in an invasion of the rights of the plaintiffs to freedom of association and freedom of speech.[3]

JUSTICIABILITY

Both Sanders v. McClellan and Ansara v. Eastland, *supra*, commit this court to the proposition that a freedom of association challenge to a Congressional subpoena is not only

---

[3] Recognizing as they do, that, since had the subpoena been served on the plaintiffs themselves, prior decisions of this court and of the Supreme Court would have made equitable intervention of the court unavailable to interfere with the execution of the subpoena, the plaintiffs here posit their entire right to equitable intervention of the district court on the *fact that the subpoena was served on a disinterested third party* who cannot be expected to test out the legality of the subpoena by subjecting itself to contempt procedures by the Committee or in any other way which would be available to the aggrieved association itself. Cf. Ansara v. Eastland, *supra*, and Sanders v. McClellan, *supra*.

a case over which the courts have subject matter jurisdiction, but that such a challenge is a justiciable issue. It is only in order to further clarify the parameters of the justiciability challenge and to relate the contention of Senatorial immunity to justiciability that we do not summarily dispose of this question on the basis of Sanders and Ansara alone.

Justiciability embodies two limitations upon the exercise of judicial power: (1) Is the question presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process? and (2) Has resolution of the question been entrusted to the judiciary under the Constitution? The former question is posed here in the form of whether courts may fashion effective relief where the sole remedy lies in the entry of an order running against members of Congress. The second question is whether judicial efforts to fashion relief would be unwarranted intrusion into the arena of political questions.

Powell v. McCormack, 395 U.S. 486 (1969) thoroughly disposes of the question as to whether a court of equity may enter an order against staff members of House or Senate:

> "Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to 'mold effective relief for resolving this case.' Respondents emphasize that petitioners ask for coercive relief against officers of the House, and, they contend, federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts. Respondents rely primarily on the speech or debate clause to support this contention.
>
> "We need to express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the district court could have issued . . . We thus conclude that in terms of the general criteria of justiciability, this case is justiciable." 395 U.S. at 512.

The availability of declaratory relief against officers of the House, which was all that was necessary in Powell, was clearly viewed by the Supreme Court as a mechanism whereby effective relief against Congressional action could be molded by the courts. Likewise, in Doe v. McMillan, ____ U.S. ____ (1973), 41 LW 4752, publication and public distribution of allegedly defamatory and privacy-invading literature by personnel other than members of Congress subsequent to authorization of publication by a House subcommittee, itself immunized, was not protected action under the Speech or Debate Clause.

Appellants have not been able to cite any case by the Supreme Court, or by Courts of Appeal, in which a federal court has finally enjoined named committee members of the Congress by way of granting coercive relief of the nature sought here. However, much has been said both by the Supreme Court and by this court clearly implying that the statutory – equitable relief of issuing a declaratory judgment as to the validity of action taken to give effect to protected Congressional committee action might be proper in such a case as this. Probably the strongest statement bearing on this difficult issue is that in Gravel v. United State, 408 U.S. 606, where, in his opinion for the court, at page 621, Mr. Justice White said:

> "None of this, as we see it, involves distinguishing between a senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, *in order to secure information for a hearing, themselves* seized the property or *invaded the privacy of a citizen.* Neither they

> nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." (Emphasis added.)

In considering whether this litigation poses a political question which is "not justiciable primarily because of the separation of powers within the Federal Government," Powell v. McCormack, 395 U.S. at 518, we begin with the formulation of the political question doctrine set forth in Baker v. Carr, 369 U.S. 186 (1964):

> "After reviewing our decisions in this area, we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:
>
> " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multi-farious pronouncements by various departments on one question.' 369 U.S., at 217."

Like Sanders v. McClellan, 463 F.2d at 897, our case falls within none of these six categories, though (1) whether there is a "textually demonstrable constitutional commitment of the issue to coordinate political department" and (2) whether there exists "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government" merit further analysis.

In Powell, the respondents contended that Art. I, Sec. 5, Clause 1[4] of the Constitution was a 'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power" to determine Powell's qualifications. After first determining "what power the Constitution confers upon the House through Art. I, Sec. 5," 395 U.S. at 519, the Supreme Court proceeded to hold that this provision committed to Congress the power "to judge only the qualifications expressly set forth in the Constitution." 395 U.S. at 548. Powell concededly met these qualifications and was not excluded by the House for failure to meet these, so the Court held that his exclusion by the House on other purported grounds of disqualification was justiciable.

In the case before us there is also no "textually demonstrable commitment" of the issue we are called upon to resolve. The government does not contend that the Speech or Debate Clause, Art. I, Sec. 6, Cl. 1[5] of the Constitution is such a commitment and since it could not seriously be contended that the acts giving effect to the committee resolution (like the conduct of the Sergeant of Arms in the Kilbourn case)[6] are within the protection of the Speech or Debate Clause, this Clause does not commit to the Senate the power to determine the legality of the subpoena.

---

[4] "Each House shall be the judge of the elections, returns and qualifications of its own members . . . ."

[5] "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same and for any speech or debate in either House, they shall not be questioned in any other place."

[6] Kilbourn v. Thompson, 103 U.S. 168 (1881).

In Doe v. McMillan, ____ U.S. ____ (1973), 41 LW 4752, the Supreme Court determined that the Speech or Debate Clause protected committee members

> "for introducing material at committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report," Id. at 4754.

but did not protect even members of Congress insofar as they published the report subsequently to the general public. By way of explanation, the Court said that

> "a member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report." Id. at 4755.

Analogizing to the instant case, we think the Speech or Debate Clause does protect the Senatorial parties from liability for *authorizing* even an unconstitutional subpoena, but does not protect whatever parties *issue or serve* such a subpoena upon a third party.

We conclude, therefore, that the issue presented by this complaint is one over which the court has subject matter jurisdiction; it is justiciable; it cannot be challenged on the ground that it deals with a "political question" or on the basis of legislative immunity..

THE RIGHTS CLAIMED TO BE VIOLATED

The United States Servicemen's Fund bases its claim for relief principally upon a threat to the right of freedom of association and assembly and protest under the First Amendment. It also, however, attacks the validity of the subpoena on the ground that the record discloses that neither the Senate Resolution, nor the Committee's resolution thereafter nor the specific resolution authorizing the chairman to issue subpoenas in support of an investigation of USSF has

the specificity required by law before such a subpoena can issue. In view of the fact that USSF is not the subject of the subpoena itself, we think the relevance of its attack on the absence of a showing of any nexus between the organization and the stated purpose of Congress is to be viewed only as it bears upon the necessity for the courts to balance the power of Congress to conduct its legislative procedures over against the First Amendment rights of the citizen. We, therefore, turn to the alleged deprivation of constitutional rights which USSF says would inevitably occur unless the subpoena were invalidated.

The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state of federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times. See NAACP v. Alabama, 357 U.S. 449; Bates v. Little Rock, 361 U.S. 516; Louisiana ex. rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Committee, 372 U.S. 539 (1962); Pollard v. Roberts, 393 U.S. 14 (1968), affirming the judgment of the three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968).

In its denial of the motion to dismiss the petition, entered at the same time as the order denying the preliminary injunction, the trial court properly determined that, upon the facts shown "there has been no evidence that any of its [USSF's] activities, or those it supports, have been of a type not protected by the First Amendment." The court, however, in balancing this right against the undoubted power of Congress to conduct committee investigations, found that the proof of irreparable damage to the plaintiffs was lacking. Such proof being absent, and the Court having determined it could not find "probably success at a full trial," it determined that a preliminary injunction should be denied.

It is clear that the factual weakness of the plaintiff's case, as viewed by the trial court, weighed heavily in its decision to deny the preliminary injunction.[6]

Although the evidence of damage, necessarily opinion evidence because no time had elapsed to permit proof of actual loss, was substantial, we need not determine whether this fact finding of the trial court was clearly erroneous. This is true because following this court's stay order of July 28, 1970, the trial court held an entirely new hearing of the case on the merits. In doing so the court followed the suggestion contained in this court's order:

> "It appears to the Court that determination of the appeal may well turn on its assessment of the merits. *Stamler* v. *Willis*, 415 F.2d, 1365 (7th Cir., 1969), cert. denied *sub nom. Ichord* v. *Stamler* 38 U.S.L.W. 3522 (June 30, 1970). It would therefore be in the interest of justice if the case could proceed expeditiously in the District Court on the merits. The final judgment of the District Court is likely to be appealed whichever way the court rules. By expedition of that appeal and consolidation with the instant appeal, it may be possible

[6] "But plaintiffs' witnesses could do little more than speculate as to the effect that disclosure of their contributors would have. Moreover, several contributors are said to have remained anonymous even from U.S.S.F. officials; manifest disclosure of Bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity. The showing of plaintiffs with respect to the adverse effect on contributors falls far short of establishing the requisite element of a preliminary injunction, namely, irreparable injury. *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958). In the face of such a strong legislative (and public) interest in the investigation at issue here, plaintiffs' showing of injury to First Amendment rights is insufficient to warrant a finding of probable success at a full trial, *cf. NAACP v. Alabama, supra*, and coupled with the validity of the Subcommittee action, certainly is an insufficient basis for granting injunctive relief against a committee of Congress. *Cf. Dombrowski v. Pfister*, 380 U.S. 479 (1965).

> both to proceed with expedition and to ensure that a question of importance is determined with the best available perspective, both as to underlying evidence and the appraisal thereof by the District Judge."

At this subsequent hearing on the merits for permanent injunction, following this court's order, the plaintiff greatly bolstered its proof of monetary injury, both by opinion testimony touching on the effect of subpoenaing the records of such a controversial organization, and by testimony by officials of the organization of substantial loss of subscriptions from potential and former supporters. The trial court foreclosed the plaintiffs from eliciting answers to questions put to officers and fund raisers who were witnesses at the trial in which the plaintiffs sought to show that certain substantial contributors had stated as a reason for not contributing a "fear of publicity attendant upon their having their identity revealed, especially the Congress investigating committee which motivates them to withhold donations which they in the past have made and are now refraining from making for that purpose." The court sustained an objection to such testimony on the ground that it was "hearsay".[7] It is questionable whether the testimony sought to be given was objectionable as hearsay, because the statements which the witnesses undertook to make to the effect that identified persons gave as the reason for not contributing their fear outlined above would seem to be admissible to show that the fundraising efforts of USSF were being interfered with because of the existence of the investigation. Such statements would not, of course, be admissible to prove the truth of the reason for not giving that the witness would say the potential contributor had given

[7] This proposed testimony was put into the record as a proffer, when the objection was sustained.

him. However, we do not need to resolve this question, for the court permitted opinion testimony from several professional fund-raisers as well as testimony, not objected to, that certain potential donors had stated the reasons to be such "fear" although earlier witnesses were not permitted to testify.

One of the professional witnesses, a professional fund-raiser,[8] gave the following opinion based on his experience as an expert in this field:

> "Fund raising is a very competitive thing. The reason we have many fund raisers as a profession is we don't create causes, but we do have an expertise in how to motivate people who want to give to various causes, in the peace movement itself, I think the Servicemen's Fund or a cultural organization, or a peace organization, there are dozens of organizations vying for the donor's dollar. Anything which can discourage people, anything which leads people to decide to deflect their contribution from one organization to another can be fatal to a fund raising effort of the particular organization. Certainly they feel their names might be turned over to a Congressional Committee which might be publicized, that there would be publicity about the fact that he had donated could have a devastating effect on fund raising of any organization."

One other professional fund raiser with some 17 years experience of the same kind, testified in much the same terms. Finally, in cross-examining the fund raiser and secretary-treasurer of USSF, the following exchange occurred:

> "Q. [by Government Counsel] You testified to some diminution in contributions received. I take it you are not attempting to say in all cases as to every donor and any particular potential donor exactly why or why not that

[8] This witness had for 20 years raised funds for "cause organizations", ACLU, Youth March for Integrated Schools, The Independent Socialists League, The League for Industrial Democracy, The A. Phillip Randolph Institute and others.

> individual has in fact ceased to contribute as much as they had before or perhaps you didn't get a contribution?
>
> A. That is correct, and certainly I am aware of specific cases, to me at least, the cause is quite apparent, the publicity about the subpoena."

Explicit testimony was given that approximately a 50 percent curtailment in money distributed by USSF for maintainance of coffee houses and supporting a large number of G.I. newspapers had occurred during the period following the service of the subpoena and that this was approximately "a reflection of the drop in contributions." These payments were significant in amount, "from roughly $10,000 a month to $5,000" in the eight month period (the subpoena was served on April 20, 1970; the trial was held on February 23, 1971).

The government made no effort to produce any contrary evidence.[9]

The trial court held the matter under advisement from February 23,1971 until October 21, 1971, at which time it denied the plaintiffs' motion for permanent injunction, and denied their motion to compel testimony from General Counsel Sourwine, of the Committee. In the meantime, this court's stay had been in effect. Thereafter it has been stayed under the earlier order of this court "pending further order of this court".

Strangely enough, following a hearing on the merits as directed by this court in its stay order of July 28, 1970, particularly to permit "a question of importance [to be] determined with the best available perspective, *both as to*

[9] On cross-examination of several plaintiffs' witnesses the government got some affirmative response to the question whether the very fact of an investigation by the Senate Committee might not result in producing some otherwise not forthcoming funds. No witness, however, varied from his testimony that the enforcement of the subpoena was and/or would be seriously damaging in the net result.

underlying evidence and the appraisal thereof by the district judge" (emphasis added), the trial court not only did not make any appraisal of the evidence introduced at the trial on the merits, but it made no finding of fact in relation to it and did not indicate that the evidence at the trial was any different from that introduced on the hearing for preliminary injunction. The court merely said "as neither the hearings on the motion nor the supporting briefs raised new matter, the court relies on its memorandum of June 30, 1970, in which these issues are fully discussed, and finds no violation of the First of Fifth Amendments."

Regardless of whether the evidence of injury was adequate in June, 1970, to require the trial court to issue a preliminary injunction, there can be no doubt that the undisputed evidence at the trial unmistakably establishes the fact that immediate and irreparable injury would result from the execution of the subpoena. One evidentiary fact that emerged in addition to the testimony of actual damage which was not before the court at the preliminary hearing, was testimony that the identity of even ostensibly anonymous and secret donors would be disclosed by examination of the bank's records. From what we know of the methods of discovery available to the Committee this evidence is convincing. Moreover, the government's brief makes crystal clear the fact that the purpose of the subpoena was to ascertain the names of the contributors to the fund and that this would be an effective means to accomplish it.":

> "The information sought to be subpoenaed herein consists of the bank records relating to appellant organization. Those records may shed considerable light on various pertinent questions and could furnish leads for further investigation. For example, knowledge of the identities of individuals and organizations providing funds could assist in answering questions as to whether any of appellants' funding comes from foreign sources, or from known subversive organizations and individuals."

This later testimony completely negatives the implications from the court's statement in its original order that "moreover, several contributors are said to have remained anonymous even from the USSF officials; manifest disclosure of bank records can have little effect on their continued contributions, and future contributors can readily undertake similarly to preserve their anonymity." However justified this statement may have been in June, 1970, it is totally unsupported by the record at the trial on the merits. Futhermore, as just pointed out above, the government's brief points to the means by which the identity of anonymous donors could be ascertained even though their names might actually not be known to the officers of the USSF:

> "The information sought to be subpoenaed herein consists of the bank records relating to appellant organization. Those records may shed considerable light on various pertinent questions *and could furnish leads for further investigations."* (emphasis added).

Can it be doubted that if the bank's records show receipt of a contribution from a brokerage firm (as witnesses testified some were received) further investigation of the brokerage firm would disclose the identity of the person whose account was charged with the corresponding amount? The same of course could follow from tracing of a cashier's check or the tracing of a check from a named foundation whose name did not identify the individual who controlled the foundation.

The trial court simply failed to make any findings of fact following the extensive testimony at the hearing on the merits. It follows, of course, that the court made no "appraisal thereof" in any manner that would carry out the clear mandate of this court, supra.

The showing made by the plaintiffs clearly meets the standards found to exist in those cases in which the Supreme Court has determined that the First Amendment was violated.

See NAACP v. Alabama, supra, and other cases cited. Nor is it significant that what is subpoenaed here is bank records rather than membership lists. See Pollard v. Roberts, supra, in which the Supreme Court affirmed the judgment of the three-judge district court in Arkansas holding that the equitable powers of the court should intervene when a local prosecutor sought to obtain the financial records of the Arkansas Republican Party, even though the prosecutor was acting in connection with the proper effort to investigate charges of criminal violations of the Arkansas statutes as to the expenditure of funds.

It is true that the cited cases came to the Supreme Court as a result of state action usually resulting in punishment for contempt for failure of the organization to produce its own records (the exception being Powell v. Roberts, *supra*). We think this is not a distinguishing factor, since the standard used in deciding whether to vindicate the guarantee of free speech and assembly must be the same when the contest is between the individual and a state legislature as it is between an individual and the United States Congress.

It is abundantly clear from this record that USSF and the coffee houses and G.I. newspapers it supported were "controversial" organizations in the same sense as were the N.A.A.C.P. and the Republican Party of Arkansas in the early 60's.

We conclude, therefore, that the rights of the plaintiffs here are of the same quality that the courts have long undertaken to protect.

As we have indicated above the appellants claim that the subpoena was defective because of the lack of specifity or the showing of a nexus between the purpose of the original Senate Resolution authorizing investigations of this general nature and the USSF and of the Sub-Committee resolution. It is true that the Sub-Committee resolution of March 11, 1970,

did not recite any basis for the investigation of USSF other than that "information collected pursuant to the Sub-Committee's resolution of October 14, 1967 [authorizing the investigation of the National Conference for New Politics] makes a prima facie showing that the organizations [of which USSF was one] and individuals hereinafter named should be subject to further investigation." There may thus be a substantial question if properly and timely raised whether the resolution authorizing the subpoena gave adequate notice of pertinency to the subject of investigation to withstand attack. In re: Chapman 166 U.S. 661. While heretofore the courts have only required such a showing to be made when a recalcitrant witness, threatened with prosecution for contempt, insists that the same notice be made as is required in a criminal prosecution by indictment or information, we pretermit altogether the question whether or not a similar showing must be made where there is not contempt prosecution at hand. Moreover, since it is clear that the government's opposition to the relief sought here is primarily based upon the immunity of a co-equal branch of the government from court interference, we could not avoid resolving the issue of Senatorial immunity *even if* we were to decide that the USSF is in a position to challenge the specificity of the authorization of the subpoena *and* that the subpoena was invalid for want of specificity.

PARTIES AND REMEDY

Following the denial of the preliminary injunction and prior to the hearing on the merits, the trial court dismissed the Senator defendants from the suit, concluding "that said defendants are personally immune from suit," citing Dombrowski v. Eastland, 387 U.S. 82 (1967).

As we have previously noted appellants have not been able to cite any case, by the Supreme Court, or by Courts of

Appeal, in which it has been held that named committee members of the Congress may be made the subject of a judgment of the court. However, in discussing the question of justiciability we called attention to the language of the Supreme Court opinion in the Gravel case, which when taken in light of existence of the remedy of declaratory judgment, strongly points to the conclusion that, if finally necessary to vindicate a constitutional right, Members may be responsive to court proceedings. We quote again the pertinent language:

> " . . . . On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, *in order to secure information for a hearing, themselves* seized the property or *invaded the privacy of a citizen*. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." (Emphasis added). 408 U.S. 606, 621.

The scope of the immunity of Members for actions within the legislative sphere has now been particularized in Doe v. McMillan, *supra*, decided since this case was submitted. It is now clear that there is no relaxation of the immunity of a Member for participating in the debate of, or action in relation to, a measure in Congress merely because the objective of the action may be unconstitutional. The court said:

> "Congressmen and their aides are immune from liability for their actions within the legislative sphere even though their conduct, if performed in other than legislative context, would in itself be unconstitutional . . . " Doe, *supra*, at 4754.

The court thus sharpens the distinction between the "legislative sphere" and the non-legislative acts carried out either by Members or others.

> "Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, Kilbourn v. Thompson, *supra*, but the Speech or Debate Clause no more insulates legislative functionaries carrying out such non-legislative directives than it protected the Sergeant at Arms in Kilbourn v. Thompson, when at the direction of the House he made an arrest that the courts subsequently found to be 'without authority.' Id. at 200. [Footnote omitted]. See also Powell v. McCormack, 395 U.S. at 504; cf. Dombrowski v. Eastland, 387 U.S. 82 (1967). The Clause does not protect 'criminal conduct threatening the security or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction."

Footnote 9 in the above quoted text clearly deals, it seems to us, with the question before us by quoting language from Grave, *supra*, analyzing the Kilbourn case:

> "That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest," citing Gravel v. U.S., 408 U.S. at 618.

Here, we have concluded that the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs. Such a determination seems well within the intendment of the language of the court in Gravel, already quoted above, that Members of Congress would have no immunity if they, "in order to secure information for a hearing, themselves . . . invaded the privacy of a citizen," Gravel, *supra*, 621.

Such a determination as this can, of course, be made only in connection with a "case or controversy," which, in turn, exists only if there are adversary parties. The trial court, not distinguishing between the actions within the "legislative

sphere" which are immune and those beyond, which are not, left no opportunity to the parties to develop a record upon which the court could draw the line between what was privileged and what was not. The court dismissed the complaint against the Senator defendants without drawing such a line.

The trial court also sustained the refusal of defendant Sourwine, the committee counsel, to answer any question at his deposition hearing except such as related to facts already disclosed by public record. The plaintiffs were therefore precluded from obtaining information from committee counsel as to the actions of staff members of the committee which may well have thrown light upon the identities of those persons who, under our concept of the case, would stand in the shoes of Mr. Thompson, the Sergeant at Arms of the House of Representatives in that famous case.

We conclude, therefore, that the trial court erred in dismissing the Senator defendants at the then stage of the proceedings. In light, also, of the line of demarcation, which we think the court has drawn between "legislative" protected acts and non-legislative non-protected conduct, which may properly be inquired into by the courts, the trial court should consider the extent to which committee counsel should properly be required to give evidence as to matters without the "legislative sphere." We further conclude that if, upon further consideration of the actions of individual members of the staff, the trial court should conclude that the case can better proceed to a decision on the validity of the subpoena by the addition of other parties. The court should be liberal in granting the right of amendment to the plaintiffs for that purpose.

We do not, of course, intimate that the court should lightly include a Senator or Member of the House of Representatives as a defendant in litigation of the kind with which we are here concerned except under unique circumstances—circumstances, which may or may not develop in this litigation, that demonstrate that such Member's presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed. Moreover, the fact that we conclude that it is appropriate in this case to reinstate the Senator defendants does not, of course, mean that it is necessary for the court, in order to grant relief, to enter any coercive order. The jurisprudence clearly indicates, it seems to us, that where relief can be adequately granted in a suit against a Member of the Congress or a Member of the Executive Department by a declaratory judgment, such procedure is preferable. In Powell v. McCormack, *supra*, 395 U.S. at 517, in discussing the question of justiciability, the court said:

> "We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief that the District Court could have issued. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may 'declare the rights . . . of any interested party . . . whether or not further relief is or could be sought.' The availability of declaratory relief depends on whether there is a live dispute between the parties, Golden v. Zwickler, 394 U.S. 103 (1969), and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. See United Public Workers v. Mitchell, 330 U.S. 75, 93 (1947); 6A J. Moore, Federal Practice ¶ 57.08 [3] (2d ed. 1966); cf. United States v. California, 332 U.S. 19, 25-26 (1947). We thus conclude that in terms of general criteria of justiciability, this case is justiciable."

It is not doubted that such a declaratory judgment will adequately protect the rights of the plaintiffs. Again, in Powell v. McCormack, at page 499, the court pointed to the effectiveness of a declaratory judgment.

The judgment of the trial court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

MACKINNON, *Circuit Judge*, dissenting: In my view the majority opinion does not face up to the facts or to the legal principles that make the subject subpoena a valid exercise of the investigative power by the United States Senate. I thus respectfully record the following dissent.

The United States Servicemen's Fund

The United States Servicemen's Fund (USSF) was incorporated in Delaware as a nonprofit membership corporation on January 6, 1969 and was granted an exemption from the payment of federal income taxes by the U. S. Internal Revenue Service in March 1969 (A. 147, 135). Its certificate of incorporation sets forth a number of charitable and educational purposes.[1]

Allegedly in the exercise of these corporate powers the USSF, among other activities, established a number of so-called "coffee houses" near and on about 17 large federal military installations (A. 119, 148, 152) and also furnished financial assistance to about 75 newspapers which were distributed on federal military bases around the world (A. 120, 150).

---

[1] 1) To stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:

2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;

3) Excuting, sponsoring and encouraging research designed to improve the general welfare of military personnel;

4) Contributing to the costs of legal representation of military personnel;

5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;

6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life. (A. 2)

In engaging in these activities the USSF contended that the activities of these coffee houses and newspapers were needed by men in the U. S. military services because such men "are in effect, inmates of a totalitarian institution" (A. 122-23) similar to "prisons, convents, boarding schools [and] mental hospitals" (A. 125) and need the "education"[2] available through the USSF coffee houses and USSF supported newspapers for their "psychological well being" (A. 128). As used by the USSF the term "education" was not used in its ordinary sense of personal development but rather referred to efforts to convert military personnel into opponents of the Vietnam War. This is clear from the description given at trial by Mr. Gutman, their counsel, of the type of "education" provided by the USSF:

> The Servicemen's Fund indeed does educate a great deal on the issues which most concern servicemen, which, of course, is the war, and the library, educational material and discussions which are carried on through the publication and meeting facilities and the library of the servicemen do indeed deal to a large extent with issues of the war, legality, the morality, the practicality and so on of the war, and the immediate issue most concern the men who are fighting and being trained to fight it. (A. 221)

Through its activities the USSF stated that it sought to bring about the "immunization" of soldiers "against the assaults of the military posts" and other "total institutions" so that they would "associate with those people of like views . . . [and] develop [a] system of counter mores . . . and a sense of personal identity or autonomy with the group of people that sits outside the total institution" (A. 125, 130). When we translate the foregoing into plain English, the USSF admits

[2] "[T]he thing which conerns us most is [one of] the war in Vietnam . . . ." Testimony of USSF expert witness Dale Edwin Noyd of Richmond, Indiana, an Assistant Professor of Psychology at Earlin College (A. 53, 150).

that it was seeking through its coffee houses and the newspapers it supported to convert military personnel into opposing the United States military operations in Vietnam (A. 150, 221) and in actual practice that is what the record indicates it was attempting to do.

Such activities brought complaints against the coffee houses and some of the personnel associated with acts which resulted from USSF supported activity. While the record at trial was not required to go extensively into such matters there was testimony indicating that the USSF coffee house at Ft. Dix was attacked by rocks, projectiles, hand grenades and several gunshots (A. 153); that the staff members of its South Carolina coffee house had been convicted of operating a common nuisance and the house padlocked (A. 153); and that one individual activist who was participating in USSF funded activities "was a bad influence around trainees, and that he was bad for the morale and discipline among the troops" (A. 110, 169-180).[3]

From a reading of the entire record it is apparent that in numerous instances, the methods the USSF elected to follow in carrying out its opposition to the United States military operations in Southeast Asia were calculated to attack the morale of service personnel and were intended to be disruptive of the then current mission of the United States military establishment in Southeast Asia as directed by national policy established jointly by the Presidents and Congresses since the 1960's. Such activities could not help but create a reasonable cause for concern.[4]

[3] The resort to force to counter the disruptive activities of the USSF, while highly improper, is an indication as to how seriously many view some of the USSF activities.

[4] United States v. Barksy, 83 U.S.App.D.C. 127, 132, 167 F.2d 241, 246 (1948), *cert. denied*, 334 U.S. 846, *rehearing denied* 339 U.S. 971.

The Investigation by the Subcommittee

Faced with such disruptive activities by the USSF directed at the morale of the armed services carrying out duly declared national policy,[5] the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate decided to investigate. In S. Res. 341, the 91st Congress had previously authorized such Subcommittee

> to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.[6]

---

[5] *Mitchell v. Richardson*, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 71-1510, March 20, 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971), *aff'g 327* F. Supp. 378 (D.Mass. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970); United States v. Sisson, 294 F. Supp. 511 (D.Mass. 1968).

[6] S. Res. 341, 91st Congress, in its entirety provides:

S. Res. 341

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized under sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate insofar as they relate to the authority of the committee to make a complete and continuing study and investigation of (1) the administration, operation, and

Acting pursuant to such authority the Subcommittee duly adopted resolutions to subpoena certain information relevant to the activities of the USSF. The Subcommittee resolution provided:

> WHEREAS, information collected pursuant to the Subcommittee's resolution of October 14, 1967 makes a *prima facie* showing that the organizations and individuals hereinafter named should be the subject of further investigation, it is directed that such investigation be carried forward by the staff; and that when the Chairman shall conclude that the results of staff investigation with respect to any such person or organization indicate the desirability of a hearing or hearings, the Chairman is authorized to issue appropriate subpoenas, including

enforcement of the Internal Security Act of 1950, as *amended*, (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

Sec. 2. For the purposes of this resolution, the committee, from February 1, 1970, to January 31, 1971, inclusive, is authorized (1) to make such expenditures as it seems advisable; (2) to employ upon a temporary basis technical, clerical, and other assistants and consultants: *Provided*, That the minority is authorized to select one person for appointment and the person so selected shall be appointed and his compensation shall be so fixed that his gross rate shall not be less by more than $2,700 than the highest gross rate paid to any other employee; and (3) with the prior consent of the heads of the departments or agencies concerned, and the Committee on Rules and Administration to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

Sec. 3. Expenses of the committee under this resolution, which shall not exceed $555,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

subpoenas *duces tecum*, to insure attendance of necessary witnesses and the production, if required, of material evidence.

* * * * * * *

The foregoing applies with respect to: United [States] Servicemen's Fund, Inc. (A. 64-65)[7]

Thus, it came to be that on May 28, 1970 the Subcommittee issued a subpoena to the Chemical Bank in New York City, over the signature of Senator James O. Eastland, Chairman of the Committee on the Judiciary and the Subcommittee on Internal Security. The text of the subpoena provided:

UNITED STATES OF AMERICA
Congress of the United States

To Chemical Bank
20 Pine Street
New York, N.Y., Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to furnish to the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Thursday, June 4, 1970, at 10:00 o'clock a.m., at their committee room 2300, New Senate Office Bldg., Washington, D. C. 20510, pursuant to S. Res. 366, 81st Congress-2d, as amended and extended, and S. Res. 341 agreed to February 16, 1970, any and all records appertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce.

[7] The original resolution was adopted on May 11, 1970. It referred to the "United *[sic]* Servicemen's Fund, Inc." On May 15, 1970 the resolution was amended to refer to the "United *States* Servicemen's Fund" (Emphasis added) (A. 66).

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Any U. S. Marshal to serve and return.

Given under my hand, by order of the committee, this 28th day of May, in the year of our Lord one thousand nine hundred and seventy.

/s/ JAMES O. EASTLAND, U.S.S.
Chairman, Committee on the Judiciary
and the Subcommittee on Internal
Security

The obvious objective in issuing this subpoena to the bank which carried the USSF deposit (A. 199) was to obtain information as to the finances of the USSF and as to who was financially supporting it in its activities. Is this a legitimate subject of inquiry by the Subcommittee? Appellants contend that it is not for various reasons. The only reason that is now important is their claim that compliance with such subpoena would interfere with their right under the First Amendment of the Constitution to freedom of association. In this respect they contend that publishing the names of their contributors by giving them to the congressional committee "could have a devastating effect on fund raising of any organization" (A. 212). At trial, there was testimony that financial contributions to the USSF did fall off for this reason. However, the testimony does not negate that they may well have fallen off because the true nature of some of the activities of USSF were disclosed. Basically the claim is made that the contributions fell off because resulting publicity was not desired by a great many of their financial contributors. Some of these contributors are in themselves "foundations" and these organizations, and the individuals who use them for such purposes, fear that disclosure of their

contributions to USSF "might be damaging to their tax position" (A. 208) under the Internal Revenue laws (A. 201). Some of the contributors are tax exempt corporations (A. 197), as is the USSF (A. 147).

Testimony indicated that some of the contributors use various means to conceal their identity as contributors, including the use of corporations, foundations and other entities (A. 194, 195, 209, 217) and the making of contributions in cash, cashiers checks (A. 195), cashiers checks with no names (A. 217), checks from brokerage houses (A. 196, 217) and through the use of funds that do not bear the family name of the contributor (A. 199). Such surreptitious methods to conceal the identity of the donors are used by "major contributors" (A. 199) and, in one other instance testified to, the contribution was "a large check . . . a substantial contribution" (A. 200). One fund raiser for the USSF testified that he received a "substantial contribution" in the form of a "bank check" that he could not trace (A. 200). Another fund raiser testified that in the last year or so she had never known "so many large contributions [to be] given anonymously" (A. 216). Whether all this evidence related to USSF contributors is not clear, but the evidence was offered in support of their claim so apparently similar instances occurred in their fund raising. So it appears that there is a strong possibility that the USSF received substantial contributions to support its activities from sources unknown even to it. These sources, as well as those sources who make their contributions without any effort at concealment, might be uncovered if this investigation is allowed to continue (A. 200).

NAACP v. Alabama and Other Decisions

The USSF contends, and the majority opinion supports such contention, that the Senate investigation of its activities

through the subject subpoena should not be allowed to continue because such action would unconstitutionally deprive the USSF of its First Amendment right to freedom of association. The majority opinion states the issue to be whether the courts of the United States have power to interfere with a congressional subpoena "when the exercise of such power threatens a deprivation of First Amendment rights of freedom of association which can be vindicated in no other way than by court decree" (Majority opinion, p.2). Having so stated the issue it concludes that the courts do not possess such power. In reaching such conclusion, without analysis, it relies upon five decisions: *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1963); and *Pollard* v. *Roberts*, 393 U.S. 14 (1968), affirming the judgment of the three-judge District Court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968).

The basis of the majority opinion is its assertion that the five cited decisions, *supra*, uphold the right of voluntary associations especially those "engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose . . . ." However, I find the five cases to be distinguishable on their facts and on grounds that justify a finding that the facts here present a "compelling . . . federal purpose." In my view when the majority opinion cites these five cases in a conclusory way it does not come to grips with the basic facts or the principles of law announced by the Supreme Court that must control the decision here.

In *NAACP* v. *Alabama*, *supra*, the Supreme Court held that the State of Alabama in its attempt to obtain the local NAACP membership lists in Alabama as part of the attempt

by the state to enjoin the NAACP further in, and to oust the organization from, the state had failed to show a controlling justification for the deterrent effect that such disclosure would have on the right of its members to associate. The subpoena that sought to compel such disclosure was a state court subpoena, no issue involving the separation of powers, federal or state, was presented and the right of association was being exercised in support of racial rights guaranteed by the Constitution which sufficiently overcame whatever interest the state had in obtaining the names of the NAACP's ordinary members.

Bates v. *Little Rock, supra,* held that two occupational license tax ordinances which required local branches of the NAACP to furnish the city officials with lists of the names of the members of the local branches of the association violated the members' right to freedom of association. The Court (Stewart, J.) recognized that the proper and efficient exercise of the power to tax may sometimes entail the possibility of encroachment upon individual freedom but it was unable to find any "relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the [local NAACP] membership lists . . . ." 361 U.S. at 524-25. This decision involving a local taxing ordinance is a far cry from the factual situation which confronts us, holding, as it does, merely that the evidence sought was not relevant.

The third decision relied upon by the majority opinion is *Louisiana ex rel. Gremillion* v. *NAACP, supra,* which in 1961 affirmed a three-judge court decision in Louisiana rendered in a declaratory judgment action brought by the NAACP. It held that a Louisiana statute which required "fraternal . . . charitable . . . [and] social organizations" to file annually with the Secretary of the State a complete list of all local members and officers violated the members' of the NAACP their constitutional rights to freedom of association as

guaranteed by the First Amendment. Some local affiliates in Louisiana of the NAACP had filed membership lists and thereafter some of its members were subjected to economic reprisals. The case stands for the principle that a state statute directed at "non-trading" corporations cannot constitutionally be applied to associations organized to further the civil rights of Negroes where the required disclosure of membership lists results in subjecting the members to economic reprisals. No question involving the separation of powers was involved and no issue was present as to the legislative right to investigate. The case is merely another extension of the recognized protection that the Constitution gives to Negro rights.

In 1963 the Supreme Court by a 5 to 4 vote decided *Gibson* v. *Florida Legislative Committee, supra.* The majority opinion was written by Justice Goldberg and dissenting opinions were filed by Justices Harlan and White. The majority held that it was a violation of the right of freedom of association to convict the president of the NAACP chapter in Miami, Florida, for contempt of a state legislative investigating committee when he refused to testify whether any of 52 or 14 named persons given to him were members of the Miami chapter of the NAACP. The committee had previously developed information that these persons had some relation to Communist activity, and the NAACP, by resolution, had previously recognized that certain branches of the NAACP were "being rocked by internal conflicts between groups who follow the Communist line and those who do not . . . [and] that there is a well-organized, nation-wide conspiracy by Communists either to capture or split or wreck the NAACP . . . ." The local president was asked by the legislative committee to testify from memory or, after refreshing his recollection, from the membership list. He refused to testify on either basis notwithstanding that the committee made it clear that they were not requiring a disclosure of the membership list.

The majority opinion was based upon its assertion that the state had not shown convincingly a substantial relation between the information sought and a subject of overriding and compelling state interest. The basis of the decision, being thus grounded on a finding of irrelevance is distinguishable from the facts here as it will hereafter be demonstrated that there is a direct compelling federal interest in subject inquiry. Moreover, a close reading of the majority and dissenting opinions convinces that the dissents by Justice Harlan and White assert the sounder law on the other points. The legislative committee obviously had a proper basis to ask the questions it did and it could not be required to prove in advance the very things it was attempting to determine. If the Senate could already prove such facts there would be no need for the subpoena. And how any intereference with the right to freedom of association is involved is not apparent. It seems clear to me that this decision will not be followed in subsequent cases, and in any event is not applicable here because of the existence here of a compelling Federal interest.

The last decision relied upon by the majority opinion is the three-judge district court decision in Arkansas, 283 F. Supp. 248 (1968) which was affirmed Per Curiam by the Supreme Court without opinion in *Pollard* v. *Roberts*, *supra*. (Justice Black was the opinion that probable jurisdiction should be noted.) In that litigation a state prosecuting attorney in Arkansas was enjoined on First Amendment grounds from subpoenaing the bank records of the Republican Party in the state, because the prosecutor "was required to make a far greater showing of relevancy and public interest in the disclosure than has been made here." 283 F. Supp. at 258. Here again the information demanded was found to be irrelevant. Underlying the decision was the common sense rationale that the list of financial contributors was not relevant to the charge of illegal vote buying that the

prosecutor was allegedly investigating.[8] The decision does not hold that a state may never require campaign contributions to be made public but merely refuses to do so "where the demand has no more substantial basis than the one involved in this case," 283 F. Supp. at 259. In fact the decision went on to hold that it was only the disclosure of "contributions" and not "expenditures" that was being enjoined,[9] and that if the prosecutor finds himself in a position to make a showing that would entitle him to see records of contributions of certain individuals that he could apply to the court to modify the injunction. 283 F. Supp. at 259. So the case merely holds that the prosecutor had not made a showing that the requested disclosure was relevant to his inquiry and is not authority for the proposition that lists of contributors can never be required.

All these cases are distinguishable from the instant case on the ground that none of them on their facts makes a showing that the lists were requested for a proper purpose.[10] Some are also distinguishable on the additional factual

[8] The Party had already disclosed all checks that it had drawn in favor of persons residing within the prosecutor's judicial district. 283 F. Supp. at 259. Thus there had been complete disclosure of "expenditures", which without further showing, was the only relevant inquiry.

[9] Some "checks indicated that they were drawn in payment for campaign services such as knocking on doors, ringing doorbells, and other activities to 'get out the vote' for Republican candidates." Pollard v. Roberts, 283 F. Supp. at 252. Such legitimate campaign activities are no proof of illegal vote buying.

[10] The right of a racial minority to be protected against oppressive conduct by government because of their attempts to protect their guaranteed civil rights weighs more heavily against governmental activity than does the right of a group to be protected against activity by government to investigate what appears to be subversive activities so as

variances pointed out above. Only one of the cases involved a legislative subpoena (state legislature) and that case was decided on the grounds that the subpoena sought irrelevant information, *i.e.*, that there was no adequate showing of a substantial relation between the information sought and a subject of compelling state interest. In the instant case, however, as is pointed out *infra*, there is a demonstrable relationship between the information sought and the valid legislative interest of the federal Congress. It is also significant that the majority opinion does not come to grips with *Barenblatt* v. *United States*, 360 U.S. 109 (1959), or *Uphaus* v. *Wyman*, 360 U.S. 72 (1959). These two cases were decided on the same day and they deal directly with the issues which are here presented.

to determine legislative policy with respect to the desirability of continuing existing statutes regulating their activity and authorizing tax exemptions for organizations so engaged. Four out of the five cited cases have strong racial overtones and related to states which, while great progress has been made in this respect in recent years, were still states where racial discrimination has been a recognized national problem. The cases with regard to Alabama and Louisiana involved states where the effect of prior suppression was such that the Attorney General determined that as late as November 1, 1964 local conditions were such that they were required to clear changes in local voting procedures in accordance with section 5 of the Voting Rights Act of 1965, as amended, 30 FED. REG. 9897, Aug. 7, 1965; 79 Stat. 439, 42 U.S.C. §§ 1973b(b), 1973c; *cf.* Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972); Perkins v. Matthews, 400 U.S. 379 (1971). This determination, involving these well recognized local situations with respect to racial matters when coupled with the objectives sought to be accomplished by the Government in these four cases, were factors that the Supreme Court would not be oblivious to in their decision. Each of these four cases is thus also distinghishable on this basis from the facts in this case.

Balancing the Competing Interests

It is apparent from the facts here that the Senate Committee was attempting to determine the names of some of the individuals and foundations that were financing the USSF. As the majority opinion notes, quoting the Subcommittee's brief:

> [K]nowledge of the identities of individuals and organizations providing funds could assist in answering questions as to whether any of appellants' questions as to whether any of the appellants' funding comes from *foreign sources*, or from known *subversive organizations or individuals*. *Supra* pp. 33-34.

The Subcommittee and the Congress have a valid legislative interest in ascertaining whether any of the money used to finance any questionable activities of the USSF came from foreign sources or subversive organizations. The activities of coffee houses and newspapers supported by the USSF were designed to, and could not possibly have failed to some extent "to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States."[11] Such activities might have caused or attempted to cause insubordination, disloyalty, or refusal of duty, and as such would have constituted violations of 18 U.S.C. § 2387(a) which provides:

> § 2387. Activites affecting armed forces generally
>
> (a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:
>
> (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
>
> (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges

[11] General Douglas MacArthur once remarked, "In war morale is to the physical as four to one." Thus, to the extent that the USSF was striking at the morale of the troops it was striking at the jugular.

> insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If some of the contributors to the USSF were from "foreign principals," there was a definite congressional interest in determining whether the Foreign Agents Registration Act had been complied with. 22 U.S.C. § 611 *et seq.* Compliance with the Internal Security Act, 50 U.S.C. § 781 *et seq.*, as the enabling resolution stated, was also a legitimate objective of the investigation by the Subcommittee. In addition, the subject matter of these statutes was also a legitimate subject of congressional inquiry in order to determine whether these laws should be retained, repealed or amended to meet new conditions, or whether new laws were needed. It would also be a permissible goal of the investigation to determine whether any of the contributors has been mislead by the use of the name "United States" in the name of the organization into believing that the USSF was sponsored or approved by the Government of the United States or by the United States Military services or any other United States department or agency. *Cf.* 18 U.S.C. § 713.

The condition and efficiency of the military is a matter of vital concern to Congress, particularly when large scale foreign military operations, such as were under way in 1970, were being undertaken. This concern arises by virtue of the constitutional grant of power to Congress:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONST. art I, § 1.

* * * * *

> The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .
>
> * * * * *
>
> To raise and support Armies . . . .
> To provide and maintain a Navy;
> To make Rules for the Government and Regulations of the land and naval Forces;
> To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

Congress' interest in the military, including its morale, is of long standing. In fact, the very first investigating committee ever established by Congress was directed to inquire "into the causes of the failure of the late [military] expedition under Major General St. Clair." The committee was empowered to "call for such persons, papers and records as may be necessary to assist their inquiries." March 27, 1792, 3 ANN. CONG. 394. It investigated matters relating to the morale of the military personnel involved, as is obvious from the committee report, which referred to desertions and discontent, 3 ANN. CONG. 1110, 1111, and found "the want of discipline . . . in the troops." 3 ANN. CONG. 1111.

Numerous subsequent investigations by Congress into military affairs are too well known to need citation. No elaborate authorities, likewise, need be recited for the principle that Congress has power to investigate any subject upon which it might legislate.[12] Thus the authority of Congress to make subject investigation is unquestioned. The only substantial issue that remains is whether the Subcommittee as an arm of the Congress can compel the production of the evidence of appellants' contributors.

That the Senate Subcommittee has authority to compel the production of such evidence is fully supported by the Supreme Court's 6 to 3 opinion in *Barenblatt* v. *United States, supra*, and its decision in *Uphaus* v. *Wyman, supra*. In *Barenblatt* the majority opinion, written by Justice Harlan, sets forth the precise principles that should control in the situation here presented. In that case the House Un-American Activities Committee was investigating Communist infiltration into the field of education and it sought corroboration from Barenblatt (a psychology instructor at Michigan and subsequently at Vassar) that he had been a Communist while he was a graduate and teaching fellow at Michigan during 1947 to 1950. Barenblatt objected to the Committee investigating his political and religious beliefs or into "any other personal and private affairs" or "associated activities" on the claim that he was privileged not to answer them by the constitutional guarantees of free speech and against self-incrimination of the First and Fifth Amendments. His claims were denied by the Committee and when he persisted in his refusal on such grounds he was tried and convicted of contempt of Congress. This conviction was ultimately upheld by the Supreme Court and it is principally with the Court's disposal of his First Amendment claims that we are here concerned. This holding is of controlling importance here

[12] Barksy v. United States, *supra*, 167 F.2d at 245.

because it is substantially the same claim that the USSF presently makes, but Barenblatt's claim was stronger because he was making a personal claim following a criminal conviction.

In disposing adversely of Barenblatt's appeal the Court held, on the point that is of importance here, that the First Amendment does not protect against disclosure of one's associational relationships in all circumstances:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

Barenblatt v. United States, supra, 360 U.S. at 126. The earlier opinion by Chief Justice Warren in *Watkins* v. *United States*, 354 U.S. 178 (1957), involving a similar issue, had provided for a similar weighing process:

> It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred .... The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.

Watkins v. United States, supra, 354 U.S. at 198.

So, in line with these authorities, what we must do here is to balance the competing private and public interests of the USSF and its contributors with those of the United States Government as represented by the powers and valid interests of the Subcommittee of the United States Senate. While the majority opinion refers to such balancing it does not indulge in it. When we do balance the competing interests we fail to find any factors which indicate that the individual interests of the USSF contributors are not subordinate to those of the Government as represented by the valid legislative interests of the Congress acting through the Senate Subcommittee. As

pointed out above the interests of the nation in the personnel of our armed services, and the security of the nation, when coupled with the express grants of constitutional power to Congress, set forth *supra*, clearly authorize Congress to investigate the subject matter presented by the activities of the USSF. We so held in *Barsky* v. *U.S.*, *supra*, stating:

> This existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation for its creators to preserve itself.
>
> 167 F.2d at 246.

In my view Congress not only has the right to investigate the activities of the USSF but it also has the duty to do so; and whether the threat is sufficient to constitute a "clear and present danger" is not controlling on the power of Congress. As we said in *Barsky*:

> We are referred to the "clear and present danger" rule expressed by Mr. Justice Holmes in Schenck v. United States and extending through the line of cases cited and discussed in Bridges v. State of California. But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of governmental policy for an existing government policy to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.
>
> 167 F.2d at 246-7.

As with the power to investigate Communist activity, the power of Congress to legislate in the field to which this subpoena is directed "rests in the last analysis on the nation's right to self preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States*, *supra*, 360 U.S. at 127-28. Certainly whether Congress would decide to continue to permit tax exempt funds to be used for such potentially subversive purposes is a proper subject for congressional inquiry, as are the additional subjects set forth *supra* at 40. Congress frequently prohibits even admittedly nonsubversive tax exempt organizations from making political contributions,[13] and federal law has long required the filing

[13] The federal statutes contain many provisions prohibiting certain tax exempt organizations from making political contributions, including the following: Agricultural Hall of Fame, 36 U.S.C. § 980; American Legion, 36 U.S.C. § 46; American War Mothers, 36 U.S.C. § 98; AMVETS, 36 U.S.C. § 67d; Big Brothers of America, 36 U.S.C. § 890; Blinded Veterans Association, 36 U.S.C. § 860; Blue Star Mothers of America, Inc. 36 U.S.C. § 950; Board for Fundamental Education, 36 U.S.C. § 510; Boys Clubs of America, 36 U.S.C. § 700; Congressional Medal of Honor Society of the United States of America, 36 U.S.C. § 800; Disabled American Veterans, 36 U.S.C. § 90f; Federal Employees, 5 U.S.C. §§ 7321, 7323; Foundation of the Federal Bar Assocation, 36 U.S.C. § 580; Future Farmers of America, 36 U.S.C. § 2280; Jewish War Veterans, U.S.A., National Memorial, Inc., 36 U.S.C. § 919; Ladies of the Grand Army of the Republic, 36 U.S.C. § 781; Legion of Valor of the United States of America, Inc., 36 U.S.C. § 640; Military Order of the Purple Heart of the United States of America, 36 U.S.C. § 830; National Conference of State Societies, 36 U.S.C. § 411; National Conference on Citizenship, 36 U.S.C. § 440; National Fund for Medical Education, 36 U.S.C. § 610; National Music Council, 36 U.S.C. § 670; National Safety Council, 36 U.S.C. § 471; National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic, 36 U.S.C. § 1011; Naval Sea Cadet Corps, 36 U.S.C. § 1050; Reserve Officers Association, 36 U.S.C. § 230; Sons of Union Veterans of the Civil War, 36 U.S.C. § 541; United States Blind Veterans of the World War, 36 U.S.C. § 86; Veterans of World War I of the United States of America, 36 U.S.C. § 771.

with the Clerk of the House of Representatives of "the name and address of each person who has made a contribution to or for [any political committee, agregating] $100 or more . . . ."[14] If such admittedly legitimate associational aactivities can be prohibited or their disclosure compelled, *a fortiori*, there is no constitutional objection to requiring disclosure from organizations such as the USSF.

The subpoena here is also clearly directed to the disclosure of what to all intents and purposes appears to be relevant evidence on a subject the Committee was authorized to investigate and it was duly issued pursuant to proper authority and in my opinion is not overly broad. But appellants assert that their contributors have a right under the associational rights guaranteed by the First Amendment to remain anonymous, i.e., to conceal their identity. This is equivalent to saying that there is a constitutional right of secrecy as to one's public political activities. On such contention *Josephson* v. *United States*, 165 F.2d 82, 92 (2d Cir. 1948) holds to the contrary, and *Doe* v. *McMillan*, ___ U.S. ___ (May 29, 1973,42 USLW 4752, holds that one's right

[14] 2 U.S.C. § 244, and *see generally*, 2 U.S.C. § 241, *et seq.*, for regulation and disclosure of those associated in admittedly legitimate political activity. And it is not unknown for newpapers to be required to register the names of their owners and publishers in order to disclose to the public the names of those responsible for its statements. For example, *See* MINN. STAT. 331.03 (1967):

> 331.03 STATEMENT OF OWNERSHIP. Each newspaper printed or published within the state, excepting legally qualified newspapers, shall register in the office of the register of deeds a statement of the owners, printers, and publishers of the paper and the residence of each and, if the same shall be published by a corporation, the names and residences of the president, secretary, and editors thereof. The register of deeds shall provide a suitable book in which to register the names as herein provided, and charge therefor a fee of 50 cents.

of privacy (allegedly based on the First Amendment) does not protect against disclosure of the identity of students engaged in certain acts in public schools of the District of Columbia by a congressional committee report issued by a congressional committee to the extent that such disclosure was reasonably within the legislative sphere. There is no showing here that the information was not being sought for use in the legislative sphere. In addition, as Judge Prettyman remarked in *Barsky* v. *U.S.*, *supra*:

> If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject.
>
> 167 F.2d at 246.

The same is true here. The identity of the individual contributors and the names of the contributing foundations is central to the concern of the Congress and is part of the subject matter of the investigation. Thus, if Congress has power to investigate the USSF and other organizations engaged in activities of the same character, then they have authority to discover and if need be disclose the identity of the individuals and foundations who provide the financial support for such organizations. Since Congress has clear authority to legislate on the subject, I see no reason why they cannot investigate fully.

Coming then to the extent that the freedom of association may prevent disclosing the identity of contributors, which is the ultimate issue before us, we come back to the answer first given above, which is that, under the conditions present in the instant case, one's rights under the First Amendment are not absolute but must be subjected to a balancing test. In weighing these competing considerations we note it is an associational right that the USSF claims for its

contributors – a claimed right of freedom of association. I am unimpressed that there is any potential denial of that right here in so far as that right is conferred by the Constitution. In this respect my view concurs with Judge White's dissenting observation in *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 584 (1963) to the effect that true freedom of association would be "promoted, not hindered," by disclosing information as to those who were supporting the USSF financially.[15] Disclosure of the identity of contributors would be a guarantee of true freedom of assocation. What kind of freedom is it for the contributing public to not know the identity of those with whom they are associating? A person who does not know, and cannot learn the identity of his associates in a venture, is not truly free. He does not have sufficient information to make a free choice – his is a compelled choice – compelled partially by lack of vital information – a blind choice.

This is a vital point here, because, as the majority opinion admits, *even the USSF do not know who some of their substantial contributors are*. The existence of these secret donors, and the likelihood that they would be disclosed if the subpoena were enforced, convinces the majority that constitutional rights would thus be infringed. However, in my view this fact is fatal to appellants' First Amendment claims. Certainly they have no right to assert a constitutional claim that they can operate the kind of activity they are carrying out here, involving as it does active opposition to declared national policy within the armed services of the United States,

[15] I would have thought that the freedom on association which is and should be entitled to constitutional protection would be promoted, not hindered, by disclosure which permits members of an organization to know with whom they are associating and affords them the opportunity to make an intelligent choice as to whether certain of their associates who are Communists should be allowed to continue their membership.

White, J., dissenting, 372 U.S. at 584.

and be *completely unaware* of the true identity of some of their substantial contributors. The USSF admitted that it does not know the source of some of its substantial contributions. One can search the First Amendment in vain to find any support for the principle that it protects or compels ignorance in such matters. These unknown contributors, as well as some of the contributors known to them, could be agents of foreign principals, or subversive individuals, or the contributing corporations or foundations might be making contributions improperly. If the USSF is engaging in the type of activities here reported and does not know the source of some of its substantial contributions it is acting recklessly and it is time that some person in authority determine the sources and the sooner the better. I see no constitutional right to privacy or secrecy in such matters. The cases cited above are to the contrary. When the USSF stepped into the public area, in my opinion, they forfeited any right to secrecy. Their acts were then public not private – and Congress has a right to investigate them.

Uphaus v. *Wyman*, 360 U.S. 72 (1959), decided the same day as *Barenblatt* is to the same effect on facts which closely resemble the facts here. In that case a subpoena was issued by the Attorney General of New Hampshire, acting on behalf of the state legislature, under a resolution directing him to investigate violations of the state subversive activities act and to determine whether "subversive persons" were then in the state. The opinion by Justice Clark required the executive director of World Fellowship, Inc., a voluntary corporation maintaining a summer camp in New Hampshire, to produce the names of all persons who attended the camp in 1954 and 1955. In so holding, the court found that the nexus between the corporation, its summer camp and subversive activities which might threaten the security of the state justified the investigation. I find the same valid nexus here between the subversive activities implicit in the allegations of the

operations of the USSF and the threat to our security posed by its acts directed at the morale of the armed services, particularly so because some of those financing the questioned activities are unkown to the USSF. It is thus my opinion that the subpoena is valid and should be complied with immediately. I would thus find that appellants were not likely to succeed on the merits for a different reason than the trial court so found, and I would accordingly refuse to issue the requested injunction and the requested declaratory judgment. It may well be that the USSF has a right to continue their propaganda activities but the Congress likewise has a right to know who is doing it, because that may affect much of their existing and possible future legislation.

The foregoing conclusion also compels the findings that the subpoena was a valid exercise of legislative power conferred upon Congress by the first sentence of the Constitution[16] and that the separation of powers deprives the courts of any further jurisdiction in the matter. The majority opinion pays lip service to the constitutional doctrine of the separation of powers but then refuses to adhere to its tenets. I find the Court's action in this case in interfering with the powers incident to the legislative function of Congress to be a gross abuse of its judicial powers. Let us assume that when the contributions are traced one of the "substantial contributors" turns out to be a foreign principal or a known subversive organization, or that there are a number of such sources. Would any person question that the Courts were wrong to delay the committee investigation for four and possibly five years? Is that respecting the powers of Congress? What the Court should do is accord the same respect to the actions of the legislative arm that we expect our judicial acts

[16] The *U.S. Const.* provides in Art. I, § 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

to receive, and that was clearly not done here. Clearly the damage from disclosure is far less than the damage that would result to the valid activities of Congress if it were prohibited from determining facts necessary for informed legislation in this field. Even if nothing subversive or improper is turned up, Congress should still be able to consider whether to continue a tax exemption policy for activities such as USSF. If the cost of this valid consideration by Congress of the activities here sought to be investigated is the destruction of some financial support to the USSF through disclosure of the identity of some of its contributors, or through the fear of such disclosure then in my view it is financial support that should not have been sought in the first place.

I also dissent from that portion of the majority opinion which directs the reinstatement of the action against the United States Senators. In doing so the majority admit their inability to "cite any case, by the Supreme Court, or by Courts of Appeals, in which it has been held that named committee members of Congress may be made the subject of a judgment in the court." To my mind it would have been more proper, instead of asserting a negative, to rely upon the recent affirmative holding of *Doe* v. *McMillan*, *supra*, that United States Senators when acting in the legislative sphere are immune from suit.[17] That they were acting here in the

[17] The majority opinion cites Doe v. McMillan, ___ U.S. ___, (May 29, 1972), 42 USLW 4752, for the proposition that publication of alleged defamatory literature by individuals who were not members of Congress, or on the congressional staff of the committee producing the report, is not protected action under the Speech or Debate Clause, but such is not the principal holding of the case and that portion of the *Doe* decision is not relevant to this case, because we do not here have any parties who are not either committee members or staff members. What is important here is that *Doe* squarely held, and the opinion was unanimous on this point, that members of Congress, members of the staff of the congressional committee, its consultant and investigator were *absolutely* immune under the Speech or Debate Clause when they were engaged in the legislative acts of compiling the committee report setting

legislative sphere is clear beyond doubt. I thus find that the action of the majority does interfere with "a textually demonstrable constitutional commitment of the issue to a coordinate political department [the Congress] [and that there is an] impossibility of [this court] . . . undertaking independent resolution [of the issue] without expressing lack of respect due coordinate branches of government . . . . " *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The majority opinion, however, decides that the "subpoena would invade constitutional rights" and in my opinion it does not since the Subcommittee was acting validly in the legislative sphere and secrecy of activities is not included within the constitutional guarantee to freedom of association. Also, there is no improper invasion of privacy here as public contributions were made by means of checks payable to an organization engaged in public activities and the nature of such public activities destroys any claim of privacy.

For all the foregoing reasons I would conclude that the balance between the individual and governmental interests here at stake must be struck in favor of the government and

. . voluminous facts and performing other legislative acts connected with such report. Thus, if *Doe* were followed, as it should be, Senator Eastland and the Senate Subcommittee staff (including Chief Counsel Sourwine) when they were gathering facts in the "legislative sphere" would be "absolutely immune" from judicial interference. Obviously members of Congress are not immune if the authorizing resolution is invalid or if it improperly "invade[s] the privacy of a citizen," but such is not this case.

that therefore the provisions of the First Amendment have not been offended. *Cf. Barenblatt v. United States, supra*, 360 U.S. at 134.[18]

The trial court denied appellant's request for an order to compel the testimony of Sourwine, Chief Counsel of the Committee, and the majority opinion would vacate such denial in order that the trial court may reconsider this matter in light of its finding that the subpoena is invalid, void and unenforceable. The majority opinion thus does not determine whether the Senate validly exercised its privileges under the Separation of Powers Doctrine of the Constitution when it adopted S. Res. 478 on October 13, 1970, 116 Cong. Rec. 36481, authorizing the Chief Counsel of the Senate Subcommittee on Internal Security to testify in response to subject subpoena *but prohibiting him from testifying except as to matters which were "of public record."* J.A. 73-77. The Resolution authorizes the Chief Counsel to give a deposition but provided, 116 Cong. Rec. 36481, certain limitations:

> "but [he] shall not testify respecting matters of which he obtained knowledge by virtue of his position and which are not matters of public record and shall not without further action by the Senate surrender any papers or documents on file in his office or under his control in his possession as Chief Counsel of the Senate Internal Security Subcommittee of the Committee on the Judiciary, Cong. Rec. October 13, 1970, S. Res. 478.

APPENDIX E(1)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 1474-70

Nos. 24,279, 24,412, 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Appeal from the United States District Court for the District of Columbia

Before: Bazelon, Chief Judge, Tuttle,* Senior Circuit Judge for the Fifth Circuit, and MacKinnon, Circuit Judge

JUDGMENT

(Filed August 30, 1973)

This case, combined for argument and consideration on appeal with cases numbered 71-1609, 71-1963 and 71-1717, came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court in accordance with the opinion of this Court filed herein this date.

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

This court's rulings with respect to cases numbered 71-1609, 71-1693 and 71-1717 will be entered at a later date.

Per Curiam

For the Court
/s/ Hugh E. Kline
Clerk

Date: August 30, 1973

Opinion for the Court filed by Circuit Judge Tuttle.
Dissenting opinion filed by Circuit Judge MacKinnon.

APPENDIX E(2)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 828-71

No. 71-1609

Progressive Labor Party, et al.

v.

Committee on Internal Security of the United States House of Representatives, et al., *Appellants*

Civil Action 1009-71

No. 71-1693

National Peace Action Coalition, et al.

v.

Committee on Internal Security of the United States House of Representatives, et al., *Appellants*

No. 71-1717

Peoples Coalition for Peace and Justice

v.

Committee on Internal Security of the United States House of Representatives, et al., *Appellants*

Appeals from the United States District Court for the District of Columbia

Before: Bazelon, Chief Judge, Tuttle,* Senior Circuit Judge for the Fifth Circuit, and MacKinnon, Circuit Judge

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

(Filed October 26, 1973)

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed, and the cases are hereby remanded to the District Court for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
/s/ HUGH E. KLINE
Clerk

Judge MacKinnon respectfully dissents for the reasons stated in his dissenting opinion in *United States Servicemen's Fund* v. *Eastland* (Nos. 24,279, 24,412 & 71-2034, decided August 30, 1973).

MEMORANDUM

As stated in the opinion of this Court in *United States Servicemen's Fund, et al.* v. *James O. Eastland, et al.*, No. 71-2034 (decided August 30, 1973, U.S.C.A. D.C. Circuit), these three cases were combined for argument and consideration on appeal with that case because it was considered by all parties that a decision in that case might well control the disposition of these. The judgments of the trial court granting preliminary injunctions in the three cases, pending a determination by this Court of the *U.S. Servicemen's* case are AFFIRMED. The cases are REMANDED to the district court for further consideration in light of *U. S. Servicemen's Fund, Inc.* v. *Eastland, et al., supra.*

APPENDIX F(1)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

Civil Action 828-71

No. 71-1609

PROGRESSIVE LABOR PARTY, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-1693

NATIONAL PEACE ACTION COALITION, ET AL.

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-1717

PEOPLES COALITION FOR PEACE AND JUSTICE

v.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Appellants*

No. 71-2034

UNITED STATES SERVICEMEN'S FUND, ET AL., *Appellants*

v.

JAMES O. EASTLAND, ET AL.

Before: Bazelon, Chief Judge; Tuttle,* United States Senior Circuit Judge for the Fifth Circuit; and MacKinnon, Circuit Judge

ORDER

On consideration of appellees' suggestion for rehearing *en banc*, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion is denied.

Per Curiam

For the Court:
/s/ HUGH E. KLINE
Clerk

Judges Tamm, MacKinnon and Wilkey would grant rehearing *en banc* for the reasons stated in Judge MacKinnon's dissent in Nos. 24,279, 24,412 and 71-2034, *United States Servicemen's Fund* v. *Eastland*, decided 30 August, 1973.

ORDER

(Filed January 23, 1974)

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam

For the Court:
/s/ HUGH E. KLINE
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX G(1)

United States of America
Congress of the United States

To: Chemical Bank
20 Pine Street
New York, N. Y.

Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to furnish to the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Thursday, June 4, 1970, at 10:00 o'clock a.m., at their committee room 2300, New Senate Office Bldg., Washington, D.C. 20510, pursuant to S. Res. 366, 81st Congress-2d, as amended and extended, and S. Res. 341 agreed to February 16, 1970, any and all records appertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce. HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

TO: Any U. S. Marshal to serve and return.

Given under my hand, by order of the committee, this 28th day of May, in the year of our Lord one thousand nine hundred and seventy.

/s/ JAMES O. EASTLAND
James O. Eastland, U.S.S.
Chairman, Committee on the Judiciary and the Subcommittee on Internal Security

APPENDIX G(2)

Original

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

FILED
April 29, 1971
James F. Davey, *Clerk*

To Amalgamated Bank, 11-15 Union Square, New York City, GREETING:

PURSUANT to lawful authority, YOU ARE HEREBY COMMANDED to be and appear before the Committee on Internal Security of the House of Representatives of the United States, or a duly appointed subcommittee thereof, on forthwith ————————, 19—, at ——— o'clock, —m., at their Committee Room, ————————————————————

————————————————————————————

then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:
Copies of records relating to the accounts of the Progressive Labor Party through April, 1971, including, but not limited to: all signature cards from inception, monthly statements from inception, current checks deposited to the accounts, any available previous checks drawn on or deposited to the accounts, deposit slips, correspondence and memoranda. ————————————————————

————————————————————————————

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To Stuart L. H. Pott, Investigator, Committee on Internal Security, to serve and return.

GIVEN under my hand this 13th day of April, in the year of our Lord, 1971.

Chairman—Chairman of Subcommittee—Member Designate of the Committee on Internal Security of the House of Representatives.

EDWIN W. EDWARDS

16—80354—1

If you desire a conference with a representative of the Committee prior to the date of the hearing, please call or write to: Counsel, Committee on Internal Security, Washington, D.C. 20515, Telephone: 225-3051.

APPENDIX G(3)(a)

original

United States of America
Congress of the United States

To: Public National Bank
1430 K Street, N.W.
Washington, DC

Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to be and appear before the Committee on Internal Security of the House of Representatives of the United States, or a duly appointed subcommittee thereof on or before May 20, 1971 at —— o'clock —m at their Committee Room ———— then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:
Copies of records relating to the accounts of the National Peace Action Coalition and Peoples Coalition for Peace and Justice, including, but not limited to: all signature cards since inception, monthly statements from inception, current checks deposited to the accounts, any available checks drawn or deposited to the account, deposit slips, correspondence and memoranda.

HERETO FAIL NOT, as you will answer for default under the pains and penalties in such cases made and provided.

TO: *Stuart L.H. Pott*, Investigator, to serve and return
Given under my hand this 12th day of May, in the year of our Lord, 1971

Richard H. Ichord
Chairman-Chairman of Subcommittee—
Member Designate of the Committee on
Internal Security of the House of
Representatives

If you desire a conference with a representative of the Committee prior to the date of the hearing, please call or write to: Counsel, Committee on Internal Security Washington, D.C. 20515, telephone 225-3051

APPENDIX G(3)(b)

original

United States of America
Congress of the United States

To: Public National Bank
1430 K Street, N.W.
Washington, DC

Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to be and appear before the Committee on Internal Security of the House of Representatives of the United States, or a duly appointed subcommittee thereof on forthwith ————, 19—, at —— o'clock, —m at their Committee Room ———— then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:

Copies of records relating to the accounts of the National Peace Action Coalition and (deletion) for the month of May, 1971, including, but not limited to: monthly statements, current checks, any available incoming or outgoing previous checks, deposit slips deposited to the accounts, correspondence and memoranda.

HEREBY FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

TO: Stuart L.H. Pott, Investigator, Committee on Internal Security to serve and return.

Given under my hand this 18th day of May, in the year of our Lord, 1971

Richard H. Ichord
Chairman-Chairman of Subcommittee—
Member Designate of the Committee on Internal Security of the House of Representatives

If you desire a conference with a representative of the Committee prior to the date of the hearing, please call or write to: Counsel, Committee on Internal Security Washington, D.C. 20515, telephone 225-3051

APPENDIX G(4)

original

United States of America
Congress of the United States

To: Public National Bank
1430 K Street, N.W.
Washington, DC

Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to be and appear before the Committee on Internal Security of the House of Representatives of the United States, or a duly appointed subcommittee thereof on forthwith ————, 19—, at —— o'clock, —m at their Committee Room ———— then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:

Copies of records relating to the accounts of and People's Coalition for Peace and Justice for the month of May, 1971, including, but not limited to: monthly statements, current checks, any available incoming or outgoing previous checks, deposit slips deposited to the accounts, correspondence and memoranda.

HEREOF FAIL NOT, as you will answer for default under the pains and penalties in such cases made and provided.

TO: Stuart L.H. Pott, Investigator, Committee on Internal Security to serve and return.

Given under my hand this 18th day of May, in the year of our Lord, 1971

Richard H. Ichord
Chairman-Chairman of Subcommittee—
Member Designate of the Committee on
Internal Security of the House of
Representatives

If you desire a conference with a representative of the Committee prior to the date of the hearing, please call or write to: Counsel, Committee on Internal Security Washington, D.C. 20515, telephone 225-3051

APPENDIX H(1)

S. RES. 341, 91st CONG. 2D SESS.

S. Res. 341

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized under sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate insofar as they relate to the authority of the committee, to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence.

Sec. 2. For the purposes of this resolution, the committee, from February 1, 1970, to January 31, 1971, inclusive, is authorized (1) to make such expenditures as it deems advisable; (2) to employ upon a temporary basis technical, clerical, and other assistants and consultants; *Provided*, That the minority is authorized to select one person for appointment, and the person so selected shall be appointed and his compensation shall be so fixed that his gross rate shall not be less by more than $2,700 than the highest gross rate paid to any other employee; and (3) with the prior consent of the heads of the departments or agencies concerned, and the Committee on Rules and Administration to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Government.

Sec. 3. Expenses of the committee, under this resolution, which shall not exceed $555,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee.

APPENDIX H(2)

Resolution of the Internal Security Subcommittee of the Senate Committee on the Judiciary

Be it resolved, by the Subcommittee on Internal Security of the Committee on the Judiciary, that the Committee staff be directed to undertake immediately a full and complete investigation of the activities of the National Conference for New Politics and any organizations and individuals affiliated or associated therewith, with respect to all areas or spheres of activity where the basic authority of the Subcommittee or any facet thereof is applicable; and that such staff investigation be followed and continued by hearings before the Subcommittee, to be held at such times and places as the Chairman shall designate. All such hearings shall be in Executive Session except as the Chairman may otherwise direct.

/s/ James O. Eastland
James O. Eastland

/s/ George A. Smathers
George A. Smathers

/s/ Thomas J. Dodd
Thomas J. Dodd

/s/ Roman L. Hruska
Roman L. Hruska

/s/ John L. McClellan
John L. McClellan

/s/ Everett M. Dirksen
Everett M. Dirksen

/s/ Sam J. Ervin, Jr.
Sam J. Ervin, Jr.

/s/ Hugh Scott
Hugh Scott

/s/ Birch Bayh
Birch Bayh

/s/ Strom Thurmond
Strom Thurmond

Approved: Oct. 14, 1967

APPENDIX H(3)

Resolution of the Internal Security Subcommittee of the Committee on the Judiciary, USS

WHEREAS, information collected pursuant to the Subcommittee's resolution of October 14, 1967 makes a *prima facie* showing that the organizations and individuals hereinafter named should be the subject of further investigation, it is directed that such investigation be carried forward by the staff; and that when the Chairman shall conclude that the results of staff investigation with respect to any such person or organization indicate the desirability of a hearing or hearings, the Chairman is authorized to issue appropriate subpoenas, including subpoenas *duces tecum*, to insure attendance of necessary witnesses and the production, if required, of material evidence.

The foregoing applies with respect to:

United Servicemen's Fund, Inc.

/s/ James O. Eastland
James O. Eastland

/s/ Robert C. Byrd
Robert C. Byrd

/s/ Thomas J. Dodd
Thomas J. Dodd

Hugh Scott

/s/ John L. McClellan
John L. McClellan

/s/ Strom Thurmond
Strom Thurmond

Sam J. Ervin, Jr.

/s/ Marlow W. Cook
Marlow W. Cook

Birch Bayh

/s/ Robert P. Griffin
Robert P. Griffin

Approved: March 11, 1970

APPENDIX H(4)

RESOLUTION

May 15, 1970

Resolved, that the resolution of the Internal Security Subcommittee of the Senate Committee on the Judiciary approved March 11, 1970, is amended by striking out "United Servicemen's Fund, Inc." and inserting in lieu thereof "United States Servicemen's Fund."

/s/ James O. Eastland
James O. Eastland
Chairman

/s/ Thomas J. Dodd
Thomas J. Dodd
Vice-Chairman

Hugh Scott

/s/ John L. McClellan
John L. McClellan

/s/ Strom Thurmond
Strom Thurmond

/s/ Sam J. Ervin, Jr.
Sam J. Ervin, Jr.

/s/ Marlow W. Cook
Marlow W. Cook

Birch Bayh

/s/ Robert P. Griffin
Robert P. Griffin

/s/ Robert C. Byrd
Robert C. Byrd

Approved: May 18, 1970.

APPENDIX H(5)

CONGRESSIONAL RECORD, OCTOBER 13, 1970
pp. S 17925—S 17926

Authorization for Chief Counsel of Internal Security Subcommittee to Respond to Notice of Deposition

Mr. BYRD of West Virginia. Mr. President, at the request of the distinguished chairman of the Committee on the Judiciary, I ask unanimous consent that the Senate proceed to the immediate consideration of Senate Resolution No. 478, which he submitted earlier today. It is my understanding that this has been cleared on the other side of the aisle.

The PRESIDING OFFICER (Mr. Nelson). The resolution will be stated.

The resolution and its preamble were read, as follows:

Whereas the case of the *United States Servicemen's Fund, et al.*, v. *James O. Eastland, et al.*, civil action numbered No. 1474-70 is pending in the U.S. District Court for the District of Columbia; and

Whereas the Internal Security Subcommittee of the Committee on the Judiciary has in its possession by virtue of Senate Resolution 366 of the 81st Congress, 2nd Session, and Senate Resolution 341 of the 91st Congress, 2d Session, certain information and evidence relating to an investigation dealing with The United States Servicemen's Fund and other organizations and persons; and

Whereas the aforementioned Civil Action No. 1474-70 was led in the United States District Court for the District of Columbia on June 1, 1970, at which time the plaintiffs, moved for a Temporary Order restraining the Subcommittee from enforcing a subpoena duces tecum issued by the Chairman of the Subcommittee and duly served upon the Chemical Bank of New York which motion for a temporary restraining order was heard and denied by the said court; and

Whereas the plaintiffs, thereupon appealed to the United States Court of Appeals for the District of Columbia, which court on June 4, 1970, stayed compliance with and enforcement of the said subpoena until such time, as the District Court shall have had an opportunity to consider, and act on the matter with the kind of consideration and deliberation that would be provided by the procedure of a hearing on an application for injunction as contrasted with a mere

temporary restraining order; and ordered that consideration of the case to be expedited by the District Court;

Whereas plaintiff's motion for a preliminary injunction was denied by the said United States District Court on June 30, 1970; and an appeal from this decision to the United States Court of Appeals is now pending; and

Whereas defendant's motion to dismiss was denied by the said United States District Court on June 3, 1970; and

Whereas the Chief Counsel of the Internal Security Subcommittee of the Committee on the Judiciary, Julian G. Sourwine, has received notice of deposition calling for his testimony regarding activities of the Subcommittee, and calling also for production of certain records and other papers of the Subcommittee; and

Whereas, a United States court has thus seen fit to stay the Subcommittee from enforcing a subpoena duly and properly served; and

Whereas, the order of the court represents an unwarranted abridgement of one of the basic principles of our governmental system, the separation of powers among the three branches of the Federal Government; and

Whereas, the right of the Congress to investigate for legislative purposes and to compel witnesses to appear and testify has always been upheld by the nation's courts; and

Whereas, by the privilege of the Senate and by Rule XXX of the Standing Rules of the Senate, information secured by staff employees of the Senate pursuant to their official duties as employees may not be revealed without the consent of the Senate; and

Whereas, by the privilege of the Senate of the United States, no document under the control and in the possession of the Senate of the United States can, by the mandate or process of the ordinary courts of justice, be taken from such control or possession but by its permission; and

Whereas, by the privilege of the Senate and by rule XXX of the Standing Rules of the Senate, no document shall be withdrawn from its files except by the order of the Senate; Therefore be it

Resolved, That when it appears by the order of the court or of the judge thereof, or of any legal officer charged with the administration of the orders of such court or judge, that documentary evidence in the possession and under the control of the Senate is needful for use in any court of justice or before any judge or such legal officer for the promotion of justice, the Senate will take such order thereon as will promote the ends of justice consistently with the privileges and rights of the Senate; and be it further

Resolved, That the Chief Counsel, Julien G. Sourwine, of the Senate Internal Security Subcommittee of the Committee on the Judiciary, is authorized to comply with an appropriate notice of deposition in the case aforesaid, but shall not testify respecting matters of which he obtained knowledge by virtue of his position or activities as Chief Counsel of the Subcommittee, which are not matters of public record and shall not without further action by the Senate surrender any papers or documents on file in his office or under his control or in his possession as Chief Counsel of the Senate Internal Security Subcommittee of the Committee on the Judiciary; and be it further

Resolved, That neither the Chairman of the Internal Security Subcommittee, nor any of the Subcommittee's members, nor the Subcommittee's Chief Counsel, nor any of its staff employees are to testify to or otherwise disclose in the aforementioned civil action any specific materials or information which may be in their possession which are not matters of public record; and be it further

Resolved, That neither the said Chairman, the said members, the said Chief Counsel, nor any staff employees are to testify to or otherwise disclose any documents, records, correspondence, memoranda, or other written or verbal in-

formation in the possession of said individuals or of the Subcommittee which are not matters of public record; and be it further

Resolved, That it is the sense of the Senate that the power of inquiry with process to enforce it is an essential and appropriate auxiliary to the legislative function, and that action by the courts which anticipatorily infringes upon or impedes the right of Congress to require the appearance of witnesses pursuant to its legislative powers, and thus contemplated Congressional action to be taken pursuant to its investigative processes violates the doctrine of separation of powers and would be an illegal and unwarranted infringement by the judicial branch upon the powers, responsibilities and duties of the legislative branch.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution?

There being no objection, the resolution was considered and agreed to.

The preamble was agreed to.

Supreme Court, U. S.
FILED
AUG 7 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1923

JAMES O. EASTLAND, et al., *Petitioners,*

v.

UNITED STATES SERVICEMEN'S FUND, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

NATIONAL PEACE ACTION COALITION, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

PROGRESSIVE LABOR PARTY, et al.

JOINT BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

NANCY STEARNS
c/o CENTER FOR CONSTITUTIONAL RIGHTS
853 Broadway
New York, N.Y. 1003

JEREMIAH S. GUTMAN
363 Seventh Avenue
New York, N.Y. 10001

PHILIP J. HIRSCHKOP
503 D St., N.W.
Washington, D.C.

BURT NEUBORNE
American Civil Liberties Union
22 East 40th St.
New York, N.Y. 10017

HOPE EASTMAN
American Civil Liberties Union
410 First Street, S.E.
Washington, D.C.

Attorneys for Respondents

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT OF THE CASE	5
Introduction	5
Facts	7
REASONS FOR NOT GRANTING WRIT	13
I. The Opinion of the Court Below is in Accordance with the Long Established Principles of Perlman v. United States	13
II. The Information Sought by Petitioners Herein Has Long Been Recognized as Being Protected by the First Amendment	18
III. There Is No Live Case Here	20
CONCLUSION	21
APPENDIX A	1a

TABLE OF CASES

Page

Anderson v. Dunn, 6 Wheat 204 (1821)..... 21

Ansara v. Eastland, 442 F.2d 751 (D.C. Cir.,1971)..... 16

Couch v. United States, 409 U.S. 322 (1973). 18

Dombrowski v. Pfister, 380 U.S. 479 (1965).. 11

Donaldson v. United States, 400 U.S. 517 (1971)..... 18

Flast v. Cohen, 392 U.S. 83 (1968)..... 10

Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1962)..... 18 ,19

Gojack v. United States, 384 U.S. 702 (1966) 21

Marshall v. Gordon, 243 U.S. 521 (1916)..... 21

McGrain v. Dougherty, 273 U.S. 135(1927).... 20

McSurely v. McClellan, 426 F.2d 664 (D.C. Cir., 1970)..... 10

NAACP v. Alabama, 357 U.S. 449 (1958).....13,18

Perlman v. United States, 247 U.S. 7 (1918).....14,15

Powell v. McCormack, 395 U.S. 486 (1969).... 10

Stamler v. Willis, 415 F.2d 1365 (7th Cir., 1969), cert. denied sub nom Ichord v. Stamler, 399 U.S. 929 (1970).....10,11

United States v. Gravel, 408 U.S. 606 (1972). 15

United States v. Nixon, U.S. (1974) 42 L.W. 5237..... 14,17

United States v. Rumley, 345 U.S. 41 (1953).. 16

United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir., 1973).2,3,7,12,13,19

Watkins v. United States, 354 U.S. 178(1957)..16

CONSTITUTION AND STATUTES

First Amendment..... 4,13,15,18

28 U.S.C. §516..... 5

28 U.S.C. §518..... 5

28 U.S.C. §519..... 5

OTHER AUTHORITIES

Annual Report of the House Committee on Internal Security of the House of Representatives, 1973, H.Rept. 93-771 21

Manual of Rules of House of Representatives, 93rd Cong., H.Doc. 384, 92nd Cong. 2d Sess..21

Stern & Gressman, Supreme Court Practice, 4th Ed. (1969)..... 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

JAMES O. EASTLAND, et al., Petitioners
v.
UNITED STATES SERVICEMEN'S FUND, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., Petitioners
v.
NATIONAL PEACE COALITION, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., Petitioners
v.
PEOPLES' COALITION FOR PEACE AND JUSTICE, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., Petitioners
v.
PROGRESSIVE LABOR PARTY, et al.

JOINT BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals in United States Servicemen's Fund v. Eastland is reported at 488 F.2d 1252. (Pet. App. A, pp. 1a-65a). Respondents' applications to the Court of Appeals for stays are not reported but two are set forth in Petitioners' Appendix; the June 4, 1970 opinion and order (Pet. App. B, pp. 67a-68a); the July 28, 1970 opinion and order (Pet. App. C, pp. 69a-70a). An additional emergency stay was granted by the Court of Appeals on July 2, 1970 which is reproduced as Res. App. A.

The opinions of the District Court in United States Servicemen's Fund v. Eastland denying respondents' motion for a preliminary injunction and denying a permanent injunction and respondents' motion to compel testimony are not reported but are set forth in Petitioners' Appendix (Pet. App. D, pp. 71a-80a and Pet. App. E, pp. 81a-84a).

JURISDICTION

The judgment of the Court of Appeals in United

States Servicemen's Fund v. Eastland was entered on August 30, 1973. The judgment in the remaining three cases was entered on October 26, 1973 in conformity with that in United States Servicemen's Fund v. Eastland (Pet. App. G, pp.862-87a). On January 23, 1974, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc (Pet. App. H & I, pp. 88a-89a) filed on behalf of the Congressional defendants by the United States. On April 18, 1974, Mr. Chief Justice Burger extended the time for petitioning for certiorari in all four cases to and including June 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the lower court correct in exercising its power to consider the constitutionality of a Congressional subpoena for the financial records of a politically controversial organization, which had been served on a third party, without requiring that disinterested third party to risk con-

tempt in order to gain review?

2. Was the lower court correct in concluding that the financial records of a politically controversial organization, which include the names of contributors to that organization as well as the names of individuals and groups receiving its financial support, are protected by the First Amendment?

3. When certiorari is sought by or on behalf of Committees or Subcommittees of the United States Congress and the Solicitor General has failed to file for that relief, should this Court consider that application although the United States is not properly before the Court?

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Introduction

Certiorari is sought by the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and by the Committee on Internal Security of the United States House of Representatives. Both committees, although represented by the Department of Justice at all stages below, are now represented by counsel other than the Solicitor General. */

---

*/ Petitioners assert an interest on behalf of the United States and the respective constituents of the bicameral Congress. It is the duty of the Solicitor General to conduct litigation in this Court "in which the United States is interested." 28 U.S.C. §518. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested...is reserved to officers of the Department of Justice, under the direction of the Attorney General." [28 U.S.C. 516 (emphasis supplied)] who in turn "shall supervise all [such] litigation...and shall direct all United States attorneys, assistant United States attorneys, and special attorneys...." 28 U.S.C. §519.

There is no indication that counsel for petitioners have been "authorized by law" so that in the absence of the Attorney General through the Soli-

(fn. continues on next page)

This opposition to the granting of the Petition for a Writ of Certiorari is filed jointly by the United States Servicemen's Fund, the National Peace Action Coalition, the People's Coalition for Peace and Justice and the Progressive Labor Party. Four different subpoenas for organizational bank records resulting in four different lawsuits are the subject of the Petition herein. One subpoena was issued by the Subcommittee on Internal Security of the United States Senate, three were issued by the House Committee on Internal Security.

In only the case of the United States Servicemen's Fund were evidentiary hearings held and full

---

(fn. continued from preceding page)

citor General, petitioners may not be properly before this Court. Even if there be some authorization in an unrevealed Congressional resolution, however, at least this Court can and should note the extended time to file granted petitioners and the last minute appearance by private counsel reasonably infer that the Solicitor General determined that he would not seek certiorari because of the absence of merit. See, Stern and Gressman, Supreme Court Practice, 4th Ed. (1969), p. 151.

decisions rendered, the decisions in the other cases, both by the District Court and the Court of Appeals being of a summary nature, in conformity with the Court of Appeals decisions in the United States Servicemen's Fund v. Eastland, (488 F.2d 1252 (D.C. Cir., 1973)). For the purposes of simplicity, respondents will therefore refer herein only to the facts in United States Servicemen's Fund v. Eastland, except where expressly noted.

FACTS

On or about April 20, 1970, the Subcommittee on Internal Security of the United States Senate (hereinafter, the Subcommittee) served a sweeping subpoena on the Chemical Bank of New York demanding the production of

> . . . any and all records appertaining to the United [States] Servicemen's Fund* such records to comprehand papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm

---

*/ The original subpoena and the resolution authorizing it incorrectly named the organization. The resolution was subsequently corrected and the subpoena re-issued. See page 9 , below.

> thereof within your control or custody or within your means to produce.

The United States Servicemen's Fund (hereinafter USSF) is a non-profit tax exempt corporation which is dedicated to the furtherance of the welfare of persons who are serving in the military. Amongst the activities it supports financially are G.I. coffeehouses, newspapers, entertainment, and civilian legal representation for military personnel.

Its bank records, subpoenaed by the Subcommittee, contained the names of USSF's contributors. They also contained the names of all individuals or projects which received financial support from the organization.

Upon notification by Chemical Bank of the Subcommittee subpoena, respondent USSF filed an action for declaratory and injunctive relief in the United States District Court for the District of Columbia. Because of a technical error in the subpoena, it was withdrawn and the civil action dismissed without prejudice to the respondents to file a new ac-

tion should a new subpoena be served.

A new subpoena was issued on May 26, 1970 returnable June 4, 1970. Respondents therefore reinstated their federal action, amending their complaint to seek declaratory and injunctive relief against the new subpoena. They sought a temporary restraining order which was denied on June 1, 1970, on the grounds that the court was without subject matter jurisdiction, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. The court, however, did not dismiss the complaint. In an emergency appeal to the Court of Appeals, a stay of the subpoena was granted on the morning of the return date, June 4, 1970, "... until the district court has an opportunity to fully consider and to act..." because of the... serious constitutional issues...presented by this litigation which require more time than is presently available for proper consideration."

On June 8, 1970 petitioners applied to the

Court of Appeals with a suggestion for a rehearing en banc. On June 24, 1970, all parties were informed that there was not a majority of the circuit judges in favor of the requested rehearing.

On June 30, 1970, after an evidentiary hearing, the District Court denied respondents' motion for a preliminary injunction on the grounds that irreparable injury had not been established, and that there had been insufficient showing of probable success at a full trial.*/ (Pet. App. D)

---

*/ The District Court also considered defendants-petitioners' contentions that (1) the defendants in the case are immune from suit; (2) that plaintiffs lack standing to object to the challenged subpoena; (3) that the complaint raises a non-justiciable issue; and (4) that the complaint fails to state a claim upon which relief can be granted. The court disposed of points (1) and (2) stating "Defendants' first two grounds merit little discussion," citing Powell v. McCormack, 395 U.S. 486 (1969); Flast v. Cohen, 392 U.S. 83 (1968); McSurely v. McClellan, 426 F.2d 664 and Perlman v. United States, 247 U.S. 7, 12-13 (1918). See, Petitioners Appendix, p. 73a. The court then proceded to dispose of defendant's third and fourth contentions concluding the issues presented by plaintiffs are justiciable and that the courts are able to grant the relief requested by plaintiffs relying on Powell v. McCormack, supra; Stamler v.
(fn. continues on next page)

Respondents immediately appealed from the denial of a preliminary injunction and again the Court of Appeals issued an emergency stay on July 2, 1970, pending further consideration. Then, on July 28, 1970, the Court extended the stay writing that "the final judgment is likely to be appealed whichever way the court rules" and that appeal from the denial of the preliminary injunction could be consolidated with the appeal from the final determination of this action." (Pet. App. C)

A hearing on the merits was held on February 23, 1971. Testimony was presented concerning the 50% drop in contributions to the organization following the service of the subpoena as well as testimony from expert witnesses concerning the "devastating effect" of a subpoena of a congressional in-

---

(fn. continued from preceding page)

Willis, 415 F.2d 1365 (7th Cir., 1969), cert. denied sub nom Ichord v. Stamler, 399 U.S. 929 (1970); and Dombrowski v. Pfister, 380 U.S. 479 (1965). (Pet. App. D, pp. 71a-80a).

vestigating committee on the fundraising capability of a politically controversial organization such as each of the respondents now before this Court. United States Servicemen's Fund v. Eastland, supra, 488 F.2d at 1266. (Pet. App. A, pp.26a and 27a.)

On October 22, 1971, the District Court issued its opinion and order, making no new findings of fact, referring back to its opinion of June 30, 1970 and denying respondents' motion for a permanent injunction. Be referring back to its earlier opinion and order, the District Court reaffirmed its power to rule on the constitutional questions before it, but denied relief on the basis of the facts presented. (Pet. App. E)

Respondent USSF then filed a consolidated appeal in the Court of Appeals.*/ On August 31,

---

*/ USSF appealed simultaneously from the denials of temporary, preliminary and permanent relief by the District Court. Its appeals were heard together with the appeals of the House Committee on International Security from the issuance by United States District Judge George L. Hart of preliminary injunctions against its subpoenas for the
(fn. continued on next page)

1973, that Court reversed the judgment of the District Court and held that:

> The showing made by the plaintiffs clearly meets the standards found to exist in those cases in which the Supreme Court has determined that the First Amendment was violated. See NAACP v. Alabama and other cases cited. USSF v. Eastland, supra at p. 1267.*/ (Pet. App. A, p.29a)

It is of that opinion of the Court of Appeals that petitioners seek review.

REASONS FOR NOT GRANTING THE WRIT

I. THE OPINION OF THE COURT BELOW IS IN ACCORDANCE WITH THE LONG ESTABLISHED PRINCIPLES OF PERLMAN v. UNITED STATES.

(fn. continued from preceding page)

bank records of National Peace Action Coalition, People's Coalition for Peace and Justice, and Progressive Labor Party.

*/ The Court of Appeals agreed with the District Court that there was jurisdiction over the subject matter, the issue was justiciable and that there were parties-defendants available who were not immune from suit.

Judge MacKinnon, who dissented from the prior grant of emergency relief also dissented from the final opinion.

The Subcommittee, in its Petition for Certiorari has attempted to characterize the opinion below as a dramatic break from judicial practice by reviewing the constitutionality of congressional committee subpoenas without requiring the subpeonaed party to submit to contempt. In fact the opinion below is fully consistent with the principles established by this Court as early as 1918 in Perlman v. United States, 247 U.S. 7 (1918).

Only this term this Court reasserted that there are some few situations when the Federal Courts must review subpoena prior to contempt. In the case of United States v. Nixon, U.S. (1974), 42 L.W. 5237, 5240, this Court stated as a threshold matter:

> The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v. United States, 247 U.S. 7 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant who owned the exhibits, sought to raise a claim of privilege. The court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt situation in order to allow immediate review of the appellant's claim of privilege. Id.

at 12-13. That case fell within the 'limited class of cases where denial of immediate review would render impossible, any review whatsoever of an individual's claims. United States v. Ryan, supra, at 533.

This case is one of the "limited class of cases" this Court mentioned for it arose as a result of a third party subpoena as in Perlman. Just as in Perlman, respondents sought court review of the subpoenas to protect their interests - here, the First Amendment rights of their supporters.

The fact that the subpoenas were issued by a congressional subcommittee in no way diminished the necessity or appropriateness of court review at the stage that it was granted. For as Mr. Justice White noted in United States v. Gravel, 408 U.S. 606 (1972):

> . . .no prior case has held that Members of Congress would be immune if they executed an invalid resolution . . . or, if in order to secure information for a hearing themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability in such circumstances. 408 U.S. at 621. (emphasis added)

Thus, the Committee's assertion of total immunity from judicial review is demonstrably baseless.

It is plain that court review of congressional committee subpoenas has always been available. United States v. Rumley, 345 U.S. 41 (1953); Watkins v. United States. 354 U.S. 178 (1957). The only question has been the timing of that review. Had the Subcommittee sought to obtain the membership records or contributors lists directly from USSF, respondent could have obtained judicial review by refusing to comply with the subpoenas and challenging the constitutionality of the subpoenas in a contempt proceeding. As both the Court of Appeals and the government recognized in Ansara v. Eastland, 442 F.2d 751, 753 (D.C. Cir., 1971), here that route was not available to respondents since they were not subpoenaed directly and "would have no way to claim their constitutional protections at the time of the committee's questioning."

As the Court below correctly noted:

Here, in this case we have the case of

> which is distinguished by this Court in both Sanders and Ansara and apparently by the government in its argument in the latter case. Here the plaintiffs have no alternative means to vindicate their rights. They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment Rights. 488 F.2d 1252 at 1260.

Here, because the subpoenas were served on third parties, the normal route of review was not available. "[D]enial of immediate review would [have] render[ed] impossible any review whatever of an individual's claims." United States v. Nixon, supra, since the third party banks could not have been expected to resist the subpoenas in order to raise respondents' claims. Therefore, respondents utilized, and the court below granted, the only review available.

The opinion of the Court below will not, therefore, as petitioners contend, "open the door to lawsuits that would cripple the process of legislative inquiry." (Petition, p. 12) It will

merely reach those situations where the legislature attempts to evade court review by issuing indirect subpoenas to third parties who cannot be expected to run the risk of contempt to protect the constitutional rights of the real party at interest, guaranteeing federal review in those few instances when the normal route of review is not available.

II. THE INFORMATION SOUGHT BY PETITIONERS HEREIN HAS LONG BEEN RECOGNIZED AS BEING PROTECTED BY THE FIRST AMENDMENT.

Petitioners have sought to charactierize the information they subpoenaed as simple financial records which fall within the principles of Donaldson v. United States, 400 U.S. 517 (1971) and Couch v. United States, 409 U.S. 322 (1973).

In fact, the information sought is plainly First Amendment protected and this case falls squarely within the principles of such well established cases as Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1962) and NAACP v. Alabama, 357 U.S. 449 (1958).

For the information in question is the functional equivalent of membership lists - the names

and in many cases, addresses of the financial supporters as well as individuals and organizations receiving the financial support of a politically controversial organization. As the court below pointed out:

> The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose, has been made clear a number of times. See NAACP v. Alabama, 357 U.S. 449; Bates v. Little Rock, 361 U.S. 516, Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Committee, 372 U.S. 539 (1962); Pollard v. Roberts, 393 U.S. 14 (1968) affirming the judgment of the three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968). United States Servicemen's Fund v. Eastland, supra, 488 F.2d at 1264. (Pet. App. 24a)

In Gibson, supra, a Florida state legislative investigating committee first subpoenaed the entire membership list of the Miami Branch of the National Association for the Advancement of Colored People, alleging that the organization was infiltrated by the Communist Party. When that demand was invali-

dated by the Florida Supreme Court, the committee required the organization's president to appear with the list and answer questions regarding specific members. This Court, recognizing the protected nature of the membership list, reversed Gibson's contempt conviction after he refused to comply with the committee's demands. Even Justice Harlan, joined by Justices Clark, Stewart and White dissenting in that case, implied that the original broadside subpoena which was invalidated by the Florida Supreme Court and which was similar to the sweeping subpoena involved herein would be in violation of the First Amendment rights of the controversial organization and its members. Gibson v. Florida Legislative Investigating Committee, supra at 582.

III. THERE IS NO LIVE CASE HERE.

Normally this Court will consider a constitutional issue when it is absolutely necessary - when, for example, the controversy is a live one. Here, the subpoenas in question are four years old, and

it would appear that whatever the Subcommittee's interest in USSF's records, their investigation of the respondent organizations has long been dead. In fact, prior to filing the Petition for Certiorari herein, the attorney for petitioners Eastland, et al., found it necessary to ask attorneys for respondents whether the United States Servicemen's Fund, whose bank records they had subpoenaed, was still alive. Certainly if the senator and his Subcommittee had continued any real investigation of the respondent organization, they would have been in possession of that most basic information which is available from sources other than bank records. One can only conclude that no live investigation is in process, and that the continued interest of petitioners is at best theoretical. In addition, there is a substantial question of mootness with respect to the subpoenas of the House Committee. */

*/ There has been no authorization of these investigations by the House since 1970. Since neither the House not its Committees are continuing bodies, McGrain v. Dougherty, 273 U.S. 135 (1927);
(fn. continues on next page)

CONCLUSION

The opinion of the court below, which petitioners sought to characterize as a radical departure from prior judicial tradition is merely an

(fn. continued from preceding page)

cf. Anderson v. Dunn, 6 Wheat 204 (1821); Marshall v. Gordon, 243 U.S. 521 (1916), an investigation must be authorized during the term in which it is pursued, Gojack v. United States, 384 U.S. 702, 707 (1966). Although Rule eleven of the Rules of the House (which establishes the Committee on Internal Security adn defines the scope of its authority), has been adopted at the beginning of each session since the subpoenas were issued, there has been no reference to any of the three organizations whose banks were subpoenaed in 1970. See 1973 Annual Report of the Committee on Internal Security of the House of Representatives, H. Rept. 93-771.

Furthermore, it is clear that all House papers die at the end of each session, Rule 26 & 36, Manual of Rules of House of Representatives, 93rd Cong., #384, 92d Cong., 2d Session, 12994. Since these 1970 subpoenas have never been renewed by the Committee they are void and can have no effect on any of these organizations. Therefore, the controversy between the House Committee and the subpoenaed organizations is moot.

application of established law as articulated in Perlman v. United States, supra, as reaffirmed in United States v. Nixon, supra, and Gibson v. Florida State Legislative Investigating Committee and the many other opinions of this Court setting forth the principles which apply where First Amendment rights are at stake.

Finally, the cases themselves are at best dormant, if not completely dead.

Therefore, respondents respectfully urge the Petition for Certiorari herein to be denied.

Respectfully submitted,

NANCY STEARNS
c/o Center For Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212)674-3303

JEREMIAH S. GUTMAN
363 Seventh Avenue
New York, N.Y. 10001
(212) 736-2226

BURT NEUBORNE
American Civil Liberties Union
22 East 40th St.
New York, N.Y. 10017
(212)725-1222

PHILIP J. HIRSCHKOP
503 D Street, N.W.
Washington, D.C.

HOPE EASTMAN
American Civil Liberties Union
410 First Street, S.E.
Washington, D.C.

Attorneys for Respondents

August, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,412 Sept. Term,1969

United States Servicemen's Fund, et al., Civil Action 1474-70

Appellants,

v.

James O. Eastland, et al.,

Respondents.

Before: Wright, Leventhal and MacKinnon
Circuit Judges,
in Chambers

ORDER

On consideration of appellants' motion for an emergency stay and for a hearing, and of appellees' opposition filed with respect thereto, and to afford an opportunity for this Court to consider the motion more fully, it is

ORDERED by the Court that enforcement of and compliance with the subpoena issued by the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate on the Chemical Bank of New York Trust Company for the production of records concerning the account of the United States Servicemen's Fund on May 26, 1970, is stayed pending further order of this Court.

Per Curiam

Judge MacKinnon dissents.

OCT 3 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, ET AL., *Petitioners*

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.,

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PROGRESSIVE LABOR PARTY, ET AL.,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, ET AL., *Petitioners*

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.,

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*

v.

PROGRESSIVE LABOR PARTY, ET AL.,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

This reply brief deals with certain arguments in the Brief in Opposition concerning (1) the propriety of petitioners being represented by private counsel, (2) the precedent for and scope of the decision below,

(3) respondents' First Amendment claim, and (4) the existence of a "live" controversy.

1. Respondents argue that the Members of Congress and their staff, as petitioners, are not properly before this Court because they are represented by private counsel rather than the Solicitor General; they urge this Court to infer that the Solicitor General is not representing petitioners because he decided their case lacks merit.[1]

Respondents' assertions in this regard are totally refuted in the August 22, 1974, letter from Solicitor General Robert H. Bork, which has been distributed to the Members of the Court. Since the matter involves the internal practice and policy of the Office of the Solicitor General, we rely upon that letter. We add only that it has never been thought that the Executive Branch, through the Department of Justice, controls the Legislative Branch by having exclusive authority to represent Members of Congress in litigation without their agreement.[2] Members of Congress are not "the United States, an agency, or officer thereof" within the meaning of 28 U.S.C. § 516, see *Steele* v. *United States,* 267 U.S. 505 (1925), and that statute has never been taken to mean that a Congressman is barred from being represented by private counsel simply because the United States is "interested" in the litigation. Otherwise, this Court should not have decided cases such as those cited in the Solicitor General's letter or, for that matter,

[1] Brief in Opposition, pp. 4-5, and note *, pp. 5-6.

[2] Indeed, during oral argument in the court below one of the judges was a "little curious" about how the Attorney General could ever act as counsel for Members of Congress. Transcript of Oral Argument, p. 38.

Powell v. *McCormack,* 395 U.S. 486 (1969), or *Gravel* v. *United States,* 408 U.S. 606 (1972).[3]

2. Respondents point to *Perlman* v. *United States,* 247 U.S. 7 (1918), in an attempt to show that here the court of appeals announced no new constitutional doctrine.[4] If *Perlman* were controlling, as respondents suggest, one would expect that the majority opinion below relied upon it. But *Perlman* is not even cited in the opinion[5] and the reason is apparent.

Perlman in no way involved judicial intrusion into the legislative process,[6] which is the central concern in this case, a concern even the majority of the court of appeals recognized when it accurately viewed the issue here as a "fundamental constitutional question of grave import to which the Supreme Court has not yet given an explicit answer" (Pet. App. 3a). The Court in *Perlman* obviously never discussed the Speech

[3] Private attorneys represented the Congressional plaintiff and the Congressional defendants in *Powell*. In *Gravel*, private counsel represented Senator Gravel while the Solicitor General represented the United States. In cases such as *Powell* and *Gravel*, respondents' argument leads to the absurd result that the Department of Justice should have represented both sides in the case.

[4] Brief in Opposition, pp. 13-18.

[5] The district court in the *Eastland* case had cited *Perlman* without discussion (Pet. App. 73a); and in their appellate brief, respondents in *Eastland* did no more than quote this portion of the district court's opinion (Brief, at pp. 9, 15). Respondents in the House Committee cases did not even cite *Perlman* in their appellate brief.

[6] In *Perlman* the owner of certain materials previously impounded as exhibits in a civil case moved to enjoin production of the materials by the clerk of the court for use by a grand jury, invoking his privilege against self-incrimination. This Court upheld Perlman's right to intervene and held that the denial of his motion was appealable, but decided on the merits that he had no right to prevent the documents from being turned over.

or Debate Clause principles set forth in our Petition, at pp. 11-16, which show why we believe that the instant case was wrongly decided. Respondents have chosen to ignore our arguments in this regard by relying upon *Perlman* and claiming that the decision below merely echoes this Court's decisions of the past.

Beyond this, respondents seek to diminish the importance of this case by contending that the novel rule adopted by the court below reaches only "those situations where the legislature attempts to evade court review by issuing subpoenas to third parties who cannot be expected to run the risk of contempt to protect the constitutional rights of the real party in interest * * *."[7] But the subpoenas here were in no way "indirect": they were issued to the owners and custodians of the documents involved. None of the courts below found any attempt "to evade court review" and there is nothing in the record to support such an assertion.

3. In regard to their First Amendment claim, which we discussed in our Petition, at pp. 16-19, respondents do no more than assert that the subpoenaed bank records are "the functional equivalent of membership lists" and therefore are immune from discovery (Brief in Opp., p. 18). Respondents fail to deal with the arguments in our Petition (pp. 17-19) that the subpoenas were directed not at USSF's records but at the records of the bank and that it is commonplace for such bank records to be discovered during investigative inquiries.[8]

[7] Brief in Opposition, p. 18.

[8] Congress has required banks to retain their records for a certain number of years. See *California Bankers Ass'n.* v. *Schultz*, 94 S.Ct. 1494 (1974).

The bank's records relating to USSF are already known to the bank's employees. The records certainly could be properly subpoenaed by a federal grand jury during a criminal investigation, particularly since "customers have no standing to object to subpoenas requiring their bank to produce records of the customers' accounts," *Harris* v. *United States*, 413 F.2d 316, 318 (9th Cir. 1969) (citing numerous cases). And there is no question that the records could be checked as a matter of routine by the Internal Revenue Service.[9] Indeed, since USSF was a tax-exempt corporation, it must have filed federal tax returns listing contributions over $5000 and the names and addresses of its contributors.[10]

Thus, the position of the USSF corporation is that although it must disclose—and to a certain extent doubtless already has disclosed—information regarding its contributions to the Executive Branch, nevertheless the bank's records should not be revealed to Congress. As we argued in our Petition, there is no reason why Congress, in properly pursuing its constitutional fact-finding function, should be barred from enforcing its subpoena for these materials, which are owned by the bank. Respondents cannot clothe the bank's records with immunity from discovery merely by labeling them the "functional equivalent of membership lists."

[9] See Section 7602 of the Internal Rev. Code, 26 U.S.C. 7602; see also *Donaldson* v. *United States*, 400 U.S. 517, 523 (1971).

[10] See Treas. Reg. 1.6033-2(a)(2)(ii)(f) (1974) (on its annual information return, the tax exempt organization must list "The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year.")

4. Respondents also assert that there is no "live case" here because the subpoenas are now four years old.[11] The age of the subpoenas only confirms the point we made in our Petition (p. 12) that the decision below, by inviting persons and organizations to come into court and halt Congressional investigations while the case winds its way to final judgment, "will open the doors to lawsuits that could cripple the process of legislative inquiry." Here respondents' frustration of the legislative process for four years surely is no reason for this Court to deny certiorari. Indeed, it is a compelling reason for the Court to grant the Petition.

The continuing concern of the Congressional defendants about the implications of the decision below is clear from the fact that they have sought review in this Court. There is nothing in the record to indicate that the investigation of USSF would be abandoned if the material sought from the bank were turned over.

Respondents assert that since petitioners' counsel called to ask whether USSF was still functioning, this shows that Congress is no longer interested in the investigation. Respondents' reference to matters not of record is, of course, highly inappropriate. We are, however, constrained to respond by noting that petitioners' counsel called USSF's attorney only after being told by the Senate Subcommittee that USSF was still alive and that his inquiry was made simply out of an abundance of caution.[12]

[11] Brief in Opposition, pp. 19A-20.

[12] Respondents also argue that the House Committee cases are moot because the subpoenas are four years old, the Session of Congress has expired, and the House is not a continuing body.

Curiously, respondents did not present this argument to the court of appeals, although it was equally applicable at that time. We suggest that if respondents are correct, the proper course is for this Court to vacate as moot the judgment below insofar as it relates to the House Committee cases. This disposition would of course not affect the USSF case.

In any event, we do not believe the House Committee cases are moot. The Committee would have been flouting the Judiciary if it had repeatedly reissued subpoenas with respect to which preliminary injunctions had been entered (see Pet., at p. 8, n.6).

In short, this case is very much alive and its implications for the future are a matter of grave concern to the petitioners. The petition for a writ of certiorari should be granted.

Respectfully submitted.

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

No. 73-1923

Supreme Court, U. S.
FILED
DEC 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JAMES O. EASTLAND, ET AL.,
Petitioners

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

NATIONAL PEACE ACTION COALITION, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PROGRESSIVE LABOR PARTY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONERS

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions Involved	3
Statement	3
A. The Proceedings Below	3
B. The Majority Opinion in the Court of Appeals	12
C. The Dissenting Opinion	14
Summary of Argument	15
Argument	20
I. The Activities of the Congressional Defendants in Subpoenaing Bank Records Were Protected From Judicial Interference by the Speech or Debate Clause	22
A. Subpoenaing Records and Documents Has Long Been Considered Something "Generally Done in a Session of Congress by One of Its Members in Relation to the Business Before It" and Is Therefore Protected Legislative Activity	22
B. The Speech or Debate Clause Cannot Be Disregarded on the Basis That the Congressional Activity Might Be Found Unconstitutional by a Court or Because the Subpoena Was Directed to a Third Party Who Could Be Expected to Comply	28

Page

II. The Subcommittee's Actions Were Not Transformed Into Non-Legislative Acts, Barred by the First Amendment, Merely Because Its Subpoena to the Bank Would Have Disclosed Records Relating to USSF 37

A. USSF's Claim of Associational Privacy in Bank's Records Is Tenuous and Does Not Justify a Court's Withdrawing Speech or Debate Clause Protection to Allow Civil Suits Against Congressmen and Their Aides 37

B. This Court's Decisions on Freedom of Association Do Not Support the Judgment of the Court of Appeals Authorizing Injunctions Against the Congressional Defendants to Prevent Receipt of the Subpoenaed Bank Records 41

Conclusion 45

CITATIONS

Cases:

Alexander v. *"Americans United", Inc.*, — U.S. — (94 S.Ct. 2053) 17, 18, 36, 37, 40
Barenblatt v. *United States*, 360 U.S. 109 35
Bates v. *City of Little Rock*, 361 U.S. 516 41
Bob Jones University v. *Simon*, — U.S. — (94 S.Ct. 2038) 36, 40
Branzburg v. *Hayes*, 408 U.S. 665 42
Brex v. *Smith*, 104 N.J. Eq. 386 31
California Bankers Ass'n v. *Schultz*, 416 U.S. 21 38
Chapman, In re, 166 U.S. 661 34
Cole, Application of, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S. 950 31
Cole v. *McClellan*, 439 F.2d 934 20
Couch v. *United States*, 409 U.S. 322 ..... 18, 38, 39
Doe v. *McMillan*, 412 U.S. 306 ..... 13, 22, 23, 24, 27, 28, 29, 35, 42, 44
Donaldson v. *United States*, 400 U.S. 517 ..... 18, 38, 39
Fischler v. *McCarthy*, 117 F.Supp. 643 (S.D.N.Y.), *aff'd*, 218 F.2d 164 (2d Cir.) 36

Page

Foster v. *United States*, 265 F.2d 183 (2d Cir.) *cert. denied*, 360 U.S. 912 38
Galbraith v. *United States*, 387 F.2d 617 (10th Cir.) .. 31
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539 ..... 41, 42
Gravel v. *United States*, 408 U.S. 606 ... 22, 23, 24, 30, 32, 36
Harris v. *United States*, 413 F.2d 316 (9th Cir.) 31
Hearst v. *Black*, 87 F.2d 68 (D.C. Cir.) 20, 31
Hutcheson v. *United States*, 369 U.S. 599 20
Kilbourn v. *Thompson*, 103 U.S. 168 ..... 22, 23, 24, 36, 42
Levine v. *United States*, 362 U.S. 614 31
Louisiana ex rel. Gremillion v. *NAACP*, 366 U.S. 293 .. 41
McGrain v. *Daugherty*, 273 U.S. 135 ..... 25, 27
McMann v. *Securities & Exchange Commission*, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 31
Missouri, Kansas & Texas Ry. Co. v. *May*, 194 U.S. 267 ..... 44, 45
NAACP v. *Alabama*, 357 U.S. 449 ..... 14, 19, 41, 42, 43
O'Donnell v. *Sullivan*, 364 F.2d 43 (1st Cir.) *cert. denied*, 385 U.S. 969 31
O'Shea v. *Littleton*, 414 U.S. 488 32
Pierson v. *Ray*, 386 U.S. 547 32
Pollard v. *Roberts*, 283 F.Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 43
Powell v. *McCormack*, 395 U.S. 486 ..... 22, 23, 24
Sanders v. *McClellan*, 463 F.2d 894 ..... 13, 20
Schultz v. *Rayburn*, 350 F.2d 666 (7th Cir.) *cert. denied*, 382 U.S. 919 38
Tenney v. *Brandhove*, 341 U.S. 367 ..... 17, 22, 23, 28, 29, 32, 35, 36, 44
United States v. *Bank of Commerce*, 405 F.2d 931 (3d Cir.) 38
United States v. *Brewster*, 408 U.S. 501 ..... 22, 23, 24, 27, 32, 44
United States v. *Cross*, 416 F.2d 1205 (8th Cir.) 38
United States v. *Johnson*, 383 U.S. 169 ..... 22, 23, 24, 30
Uphaus v. *Wyman*, 360 U.S. 72 ..... 35, 36, 41
Watkins v. *United States*, 354 U.S. 178 35

Page

CONSTITUTION AND STATUTES:

United States Constitution:

First Amendment 3, 13, 15-20, 22-24, 27-30, 32, 35, 37, 40, 42, 44

Article I, Section 6, Clause 1 (Speech or Debate Clause) 3

Internal Security Act, 50 U.S.C. § 781 *et seq.* 6
2 U.S.C. § 192 35
18 U.S.C. § 713 34
18 U.S.C. § 2387(a) 33, 34
26 U.S.C. § 6103(d)(1)(A) 41
26 U.S.C. § 6103(d)(2) 41
26 U.S.C. § 7421(a) 37
22 U.S.C. § 611 *et seq.* 33
28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

S. Res. 366, 81st Cong., 2d Sess. 6
S. Res. 341, 91st Cong., 2d Sess. 6
S. Res. 478, 91st Cong., 2d Sess. 8
S. Res. 60, 93d Cong., 1st Sess., § 3(a)(5) 26
House Res. 5, 92d Cong., 1st Sess. 11
House Rule XI, Clause 11(a) 11
116 Cong. Rec. 3417 6
116 Cong. Rec. 36481 8
Hearings before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. 26
Treas. Reg. 1.6033 5
Treas. Reg. 1.6033-2(a)(2)(ii)(f) 40
Hallum, *Constitutional History of England*, 307 (5th ed. 1867) 25
Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926) 25, 26, 27
I Morrison, Commager & Leuchtenburg, *The Growth of the American Republic*, 305 (6th ed. 1969) 26
Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U.Pa.L.Rev. 691 (1926) 26

Page

Sky, *Judicial Review of Congressional Investigations: Is There An Alternative to Contempt?* 31 Geo. Wash. L. Rev. 399 21
Van Altyne, *Congressional Investigations*, 15 F.R.D. 471 (1954) 26
5 Debates on the Federal Constitution 406 (Elliot ed. 1876) 23
2 Farrand, Records of the Federal Convention of 1787, p. 246 (1966 ed.) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, ET AL.,
Petitioners

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

NATIONAL PEACE ACTION COALITION, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PROGRESSIVE LABOR PARTY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority opinion of the court of appeals (App. 46-82) [1] and the opinion of the dissenting judge (App. 82-110) are reported at 488 F.2d 1252.

In *Eastland* v. *United States Servicemen's Fund*, the June 4, 1970, opinion and order (App. 21-22) and the July 28, 1970, opinion and order (App. 34-35) of the court of appeals on respondents' application for stays are not reported.

The opinions of the district court in *Eastland* v. *United States Servicemen's Fund* denying respondent's motion for a preliminary injunction (App. 23-32) and denying a permanent injunction and respondents' motion to compel further depositions (App. 35-39) are not reported.

JURISDICTION

The judgment of the court of appeals in *Eastland* v. *United States Servicemen's Fund* (App. 111-112) was entered on August 30, 1973. The judgment in the remaining three cases was entered on October 26, 1973 (App. 113-114). On January 23, 1974, the court of appeals denied a timely petition for rehearing with a suggestion for rehearing *en banc* (App. 115-116) filed on behalf of the Congressional defendants by the United States. On April 18, 1974, Mr. Chief Justice Burger extended the time for petitioning for certiorari in all four cases to and including June 22, 1974. The petition for a writ of certiorari was filed on June 22, 1974, and granted by this Court on October 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the joint appendix filed with Petitioners' Brief on the Merits.

QUESTION PRESENTED

Whether, in four actions brought by organizations against Committees of Congress, their Chairmen, Members and staff, a court can enjoin or declare void under the First Amendment despite the Speech or Debate Clause and the separation of powers doctrine, subpoenas issued by the Committees to banks requiring the production of bank records relating to the organizations.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1, of the Constitution of the United States provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place.

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

A. The Proceedings Below

During 1970 and 1971, organizations and individuals instituted four suits in the United States District Court for the District of Columbia seeking declaratory and

injunctive relief against the enforcement of subpoenas *duces tecum* issued to banks by Congressional Committees.

In the first of these cases, *Eastland* v. *United States Servicemen's Fund* (USSF), the plaintiffs were the respondents USSF and two of its officers.[2] USSF is a corporation, incorporated on January 6, 1969, in the State of Delaware (App. 82). As a non-profit membership corporation, USSF listed in its certificate of incorporation a number of charitable and educational purposes allegedly designed "to further the welfare of persons who have served or are presently serving in the military."[3] By the Spring of 1970 the corporation's activities included establishing and funding "coffee houses" near and on 17 federal military installations and furnishing financial assistance to about 37 newspapers distributed on federal military bases around the world.[4]

At the time of its incorporation in January 1969, USSF applied to the Internal Revenue Service for tax exempt status, which the IRS granted two months later.[5] In February 1970, the IRS audited the records of USSF and thereby received substantially the same information that USSF was required to provide on its annual information tax return.[6]

The instant case arose from the following events. In March 1970, the Senate Subcommittee on Internal Security adopted a resolution stating that a *prima facie* showing had been made that USSF should be the subject of further investigation and authorizing the issuance of subpoenas in aid thereof.[7] (App. 125.)

---

[2] The complaint described plaintiffs Robert Zevin and Corrinna Fales as, respectively, USSF's Secretary-Treasurer and Executive Director (App. 12).

[3] Complaint ¶ 1A. The complaint (App. 10-11) alleged that the following were among the purposes listed in the certificate of incorporation:

"1) to stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:

2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;

3) Executing, sponsoring and encouraging research designed to improve the general welfare of military personnel;

4) Contributing to the costs of legal representation of military personnel;

5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;

6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life."

In furtherance of these purposes USSF provides funds for (a) the establishment and operation of coffee houses, which are gathering places of recreation for persons in military service as well as the providing of entertainers for military personnel; (b) the establishment and operation of newspapers which provide information particularly of interest to military personnel; (c) the supplying of educational materials such as films, books, periodicals, and entire libraries for military personnel; (d) the providing of civilian legal representation for military personnel due to the inadequacies of military justice."

[4] Testimony of Robert Zevin, in Hearing before the District Court on June 16, 1970, at pp. 88-90.

[5] *Id.* at p. 93.

[6] *Id.* at p. 94. See Treas. Reg. 1.6033-2 (1974).

[7] This resolution of March 11, 1970, named as the subject of inquiry "United Servicemen's Fund, Inc."; in a resolution passed on May 15, 1970, this was amended to name "United States Servicemen's Fund, Inc." (App. 125, 126).

Earlier, Senate Resolution 341, 91st Cong., 2d Sess. (116 Cong. Rec. 3417-3418) (1970) had authorized the Subcommittee "to make a complete and continuing study and investigation" of the administration of the Internal Security Act of 1950 and laws relating to espionage, sabotage and protection of the internal security of the United States, and the extent, nature and effect of subversive activities in the United States, including, but not limited to espionage, sabotage and infiltration by persons who are or may be under the control of foreign governments or organizations or other movements seeking to overthrow of the government of the United States by force or violence (App. 122-123).[8]

Pursuant to the foregoing authority, the Senate Subcommittee on Internal Security, over the signature of Chairman Eastland, issued a subpoena *duces tecum* to the Chemical Bank New York Trust Company, 20 Pine Street, New York, New York, on May 28, 1970,[9]

[8] Pursuant to the predecessor of this resolution (S.Res. 366, 81st Cong., 2d Sess.), the Senate Subcommittee had adopted a resolution on October 14, 1967, directing an investigation of the National Conference for New Politics and associated organizations; the resolution further provided that all hearings in connection with such investigation shall be in Executive Session except as the Chairman may otherwise direct (App. 124).

This resolution was cited and relied upon in the Subcommittee's resolution of March 11, 1970 (note 7 *supra*).

[9] The Subcommittee's original subpoena *duces tecum* to the bank, issued on April 16, 1970, was withdrawn because of a technical error concerning the organization's name (see note 7, *supra*); respondents had instituted a suit regarding that subpoena on May 14, 1970. On May 21, 1970, another subpoena to the bank was issued with a return date of May 28, 1970, but this was withdrawn at the request of the respondents. (Complaint ¶¶ III, 9-15.) (App. 13-14).

directing the bank to bring to the Subcommittee "any and all records pertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce." (App. 117).

On June 1, 1970, shortly before the return date of the subpoena directed to the Chemical Bank, USSF and the individual respondents filed a complaint against the Chairman, Members and Chief Counsel of the Subcommittee on Internal Security[10] and the bank (App. 10). The complaint alleged *inter alia* that the "sole purpose" of the subpoena was to "harass, chill, punish and deter" respondents in the exercise of their First Amendment rights and that contributions to USSF from private individuals and foundations will diminish if the bank complies with the subpoena. Respondents sought an injunction restraining the bank from complying with the subpoena and enjoining the Subcommittee Chairman, Members and Chief Counsel from seeking to enforce the subpoena by using the power of contempt, and a declaratory judgment that the subpoena was void and illegal under the Constitution. (App. 16-19).

When the district court refused to issue a temporary restraining order, the court of appeals, with one judge dissenting, ordered a stay in the enforcement of the subpoena pending a hearing on respondents' applica-

[10] The complaint named as defendants sued in their official capacity Chairman James O. Eastland, Senators John L. McClellan, Sam Ervin, Birch Bayh, Thomas J. Dodd, Robert C. Byrd, Strom Thurmond, Marlan W. Cook, Robert P. Griffin and Hugh Scott, and Chief Counsel J. G. Sourwine (App. 12-13).

tion for an injunction (App. 21-22). After a hearing, District Judge Oliver Gasch, in an opinion dated June 30, 1970, denied respondents' motion for a preliminary injunction and denied petitioners' motion to dismiss the complaint (App. 23-32). The court of appeals then stayed enforcement of the subpoena until final disposition on appeal, but urged the district court to allow the case to go to final judgment in the interim (App. 34-35).

Thereafter, respondents noticed the depositions of Chairman Eastland and the Subcommittee's Chief Counsel, but the district court, holding that the Senators had personal immunity under *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), ordered them dismissed as defendants (App. 19-20). When respondents sought to depose the Chief Counsel, who remained as a defendant, the Senate passed S. Res. 478, 91st Cong., 2d Sess., 116 Cong. Rec. 36481-82 (App. 126-130), allowing the Chief Counsel to testify only in regard to matters of public record. (App. 110 n. 18). Respondents sought an order to compel further testimony. (App. 35).

In a hearing before the district court on February 23, 1971, respondents called four witnesses (two of whom had raised funds for USSF) to testify in regard to the effect on contributions to USSF. Their testimony indicated that some donors desired to remain anonymous;[11] that these donors sought to hide their identity by delivering contributions in the form of cash, cashier's checks[12] or checks drawn on corporations that were "fronts for an individual";[13] and that these donors desired anonymity because they were "modest";[14] or feared "for their professional positions or their job" or "their tax position";[15] or because they did not wish their name to become known to other organizations who would seek contributions from them.[16]

[11] Appellants' App. A194, A199-A200 ("Appellants' App." refers to the appendix filed in the court of appeals by respondents in *USSF*).

[12] *Id.* at A195.

There was also testimony that after the Subcommittee issued its subpoena in the Spring of 1970, USSF lost a donor who had been giving $10,000 a year[17] and that, in general, since fundraising was very competitive "anything which leads people to deflect their contribution from one organization to another can be fatal to a fundraising effort of the particular organization."[18] However, the testimony also showed that at the time of the Subcommittee's subpoena—June 1970—USSF had received a letter from the Internal Revenue Service questioning USSF's tax-exempt status; that this was mentioned in the *New York Times* a few days later; and that lack of a tax exemption would "certainly" have an adverse impact on USSF's contributions.[19] (USSF's tax-exempt status was not revoked.)[20] The witnesses said in addition that the fact

[13] *Id.* at A217.

[14] *Id.* at A207.

[15] *Id.* at A207-A208.

[16] *Id.* at A213.

[17] *Id.* at A202, A204.

[18] *Id.* at A212.

[19] *Id.* at A231, A234.

[20] *Ibid.* Also, counsel for USSF stated in oral argument in the court of appeals on January 15, 1974, that USSF was at that time a tax-exempt organization. Transcript of Oral Argument, at p. 4.

that an organization becomes the subject of a Congressional investigation can be—and, indeed, has been—utilized successfully as a fundraising device.[21]

On October 21, 1971, eight months after the foregoing hearing, the district court issued an opinion denying a permanent injunction and rejecting respondents' motion to compel the further testimony of Chief Counsel Sourwine (App. 35-39).

Respondents then appealed this final order, which appeal the court of appeals combined with the pending appeal from the trial court's denial of a preliminary injunction (App. 55). With the *USSF* case, the court of appeals also combined for argument and decision three cases[22] in which suits had been brought against the Committee on Internal Security of the House of Representatives by organizations seeking to enjoin the enforcement of subpoenas *duces tecum* directing various banks to produce records relating to those organizations (App. 48).[23]

---

[21] *Id.* at A215, A224.

[22] *Progressive Labor Party, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1609); *National Peace Action Coalition, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1693); *Peoples Coalition for Peace and Justice, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-2034).

[23] The subpoenas were substantially the same and directed the banks to furnish (App. 118-123):

> Copies of records relating to the accounts . . . including, but not limited to: all signature cards since inception; monthly statements from inception, current checks deposited to the accounts, any available checks drawn or deposited to the accounts, deposit slips, correspondence and memoranda.

See also J. App. 8-10, 49, 62, 102-103 ("J. App." refers to the Joint Appendix (Consolidated) filed in the court of appeals in the

In each of the three House Committee cases, the plaintiffs (respondents in this Court) were the named organization and various officers of the organization;[24] in the *Progressive Labor Party* and *National Peace Action Coalition* cases, plaintiffs also included "John Doe" and "Richard" or "Mary Roe"—pseudonyms representing anonymous contributors to and members of the organizations.[25] Defendants in each of these cases—now petitioners in this Court—were the House Committee on Internal Security and its Chairman, Members, Chief Counsel and Investigator.[26] Also named as a defendant in each case was the bank to which the subpoena had been directed.

House Committee cases). The subpoenas directed the Committee Investigator "to serve and return."

The resolutions of the House Committee on Internal Security (a standing committee of the House of Representatives, see House Res. 5, 92d Cong., 1st Sess., Jan. 22, 1971, House Rule XI, Clause 11(a)) authorizing investigations of the respondent organizations are reprinted in the Consolidated Brief for Defendant-Appellants in the court of appeals, at pp. 6-8.

Prior to institution of the suits in the *National Peace Action Coalition* and *Peoples Coalition for Peace and Justice* cases, the bank had already partially complied with the subpoenas by providing the Committee with checks, ledger sheets and other documents relating to the organizations. J. App. 33-34, 77-78.

[24] The Progressive Labor Party described itself as a "National political organization dedicated to the supplanting of the capitalist economic system by a socialist economic system" (J. App. 2). The National Peace Action Coalition and the Peoples Coalition for Peace and Justice described themselves as national organizations dedicated to the immediate termination of the war in Southeast Asia (J. App. 31, 75).

[25] See J. App. 2-3, 31-32, 75-76.

[26] In the *Progressive Labor Party* case, however, the Members named as defendants were only those Representatives who were also Members of the Subcommittee of the House Internal Security Committee authorized to investigate the Progressive Labor Party (J. App. 3).

These three suits involving the House Committee were on appeal from preliminary injunctions entered by the district court pending the decision by the trial court in *USSF*.[27] The constitutional claims raised in each of the three complaints, which sought declaratory and injunctive relief,[28] were the same as those raised in the *USSF* complaint and the district court therefore entered the preliminary injunctions in reliance on the stay orders previously issued by the court of appeals in *USSF*.[29]

B. The Majority Opinion in the Court of Appeals

Discussing only the facts involved in the *USSF* case, a majority of the court of appeals,[30] with Judge MacKinnon dissenting, reversed the judgment of the trial court in *USSF*, affirmed the orders granting preliminary injunctions in the remaining cases and remanded all four cases for further proceedings.[31]

The court majority rejected the argument that courts could not interfere by injunctive remedies with duly

[27] The district court, on April 29, 1971, in the *Progressive Labor Party case*, on May 21 and May 28, 1971, in the *National Peace Action Coalition* case, and on May 28, 1971, in the *Peoples Coalition for Peace and Justice* case, entered preliminary injunctions enjoining the banks from complying with so much of the issued subpoenas as required the banks to produce current checks deposited to the organizations' accounts and any available previous checks drawn or deposited to the accounts (App. 39-45).

[28] The National Peace Action Coalition and the Peoples Coalition for Peace and Justice sued for damages as well (J. App. 5-7, 34-37, 78-81).

[29] In all four cases the United States Department of Justice represented the Congressional defendants in the courts below.

[30] Chief Judge Bazelon and Judge Tuttle, sitting by designation.

[31] See the judgments entered by the court of appeals, at App. 111-114.

authorized legislative subpoenas. The court reiterated its ruling in *Sanders* v. *McClellan*, 463 F.2d 894 (1972), that an alleged "chilling effect" on First Amendment rights of a witness subpoenaed by a Congressional Committee does "not outweigh the right of the Subcommittee, acting under valid congressional authority, to make its inquiries * * * free of prior judicial interference" (463 F.2d at 903), but nevertheless held that the bar against prior judicial interference does not apply when the subpoena is addressed to a third party because the complaining parties have "no alternative means to vindicate their rights" other than by an action to enjoin the subpoena (App. 60).

The court of appeals further held that while the Speech or Debate Clause protects Members of Congress from suit for *authorizing* a subpoena, it does not protect either Members or employees of Congress from suit for *issuing* or *serving* an "unconstitutional" subpoena (App. 67), apparently because such unconstitutional acts are outside the "legislative sphere" within the meaning of *Doe* v. *McMillan*, 412 U.S. 306 (1973) (App. 77-78). Although the court was unable to identify any act performed by any Member of Congress or the Chief Counsel in the *USSF* case falling outside the "legislative sphere," it reversed the judgment dismissing the Senators as defendants and called for further hearings to determine whether any Member's "presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed" (App. 80).[32]

[32] In the three House Committee cases, the Court affirmed the preliminary injunctions entered by the district court but remanded the cases for further consideration in light of its opinion in *USSF* (App. 113-114).

In the view of the majority of the court of appeals, "the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs" (App. 78). In reaching this conclusion the majority recognized the "undoubted power of Congress to conduct committee investigations" (App. 68), and did not question that the subpoena in the *USSF* case was a valid exercise of that power apart from its claimed effect on the First Amendment rights of the plaintiffs. Rather, the court held that USSF was a "controversial" organization, that exposure of the names of contributors to USSF would deter contributions, and that this showing alone established a violation of the First Amendment rights of the respondents and rendered the subpoena unconstitutional.[33]

C. The Dissenting Opinion

Judge MacKinnon dissented, insisting that the court's decision was "a gross abuse of its judicial powers" (App. 107). He found no constitutional violation in the requests for bank records, distinguishing the line of cases beginning with *NAACP* v. *Alabama*, 357 U.S. 449 (1958), on the grounds that "none of them on their facts makes a showing that the lists were requested for a proper purpose" (App. 94). He concluded that since the subpoena was a valid exercise of legislative power, the "separation of powers deprives the courts of any further jurisdiction in the matter" (App. 107). He also disagreed with the majority's

[33] In a consolidated supplemental brief filed after the argument in the court of appeals, respondents stated that the court might lack jurisdiction over the banks and that in any event injunctions solely against the banks would not adequately protect their First Amendment rights.

conclusion that the Senators should be reinstated as defendants and with the authorization for compulsory testimony to be obtained from the Chief Counsel (App. 110 & n.18).

SUMMARY OF ARGUMENT

I.

A.

This Court's prior decisions in regard to the Speech or Debate Clause establish that one of the purposes of the Clause is to prevent legislators from being held accountable before a possibly hostile judiciary; that their conduct is protected even if it might otherwise be considered unconstitutional; that the Clause insulates from judicial scrutiny anything generally done by a Congressman in relation to the business before the House; and that the protection of the Clause extends not only to Congressmen but also to their aides insofar as the conduct of the latter would be protected if performed by the Member himself.

The challenged Congressional activities here—subpoenaing bank records—fall squarely within the foregoing definition of conduct protected by the Clause. From the first Parliamentary committees in the late 1600's, through the legislative committees established early in this nation's history, up to the present operations of Congress, the legislative acts of requiring the production of documents by compulsory process have been considered a necessary attribute of the very power to legislate. As such, the Congressmen (and their aides) who perform these acts cannot be forced to defend private civil suits challenging the constitutionality of such activities.

B.

To hold that the Clause provides no protection to Congressmen if their actions are found by a court to violate some other constitutional provision is to emasculate the Clause itself. It would mean that the Clause bars the judiciary from holding a Congressman accountable only when the Congressman would otherwise prevail on the merits, which of course is no protection. Moreover, this Court has held that legislators cannot be forced to defend actions upon the conclusions of a pleader.

Respondents argue that the courts must be permitted to intervene when subpoenas are directed to a third party who can be expected to comply and when such compliance would invade their constitutional rights. That the Speech or Debate Clause, if applied, would preclude judicial scrutiny is not a reason for holding the Clause inapplicable; it is instead merely a restatement of the principle established by this Court that the Clause confers immunity regardless whether a court might find the legislators' conduct "unconstitutional."

Moreover, although this Court has held that the Clause precludes judicial inquiry into the purposes or motives underlying legislative acts, a trial such as that contemplated by the court below necessarily entails such an inquiry since the mere fact that a bank's records regarding a corporation have been subpoenaed does not render the subpoena unconstitutional or supply a reason for judicial intervention. Thus, when an independent federal agency or the Internal Revenue Service or a grand jury subpoenas bank records of a customer, the courts have held that the customer lacks standing to contest the subpoena. This being so in regard to agencies of the Executive and Judicial Branches, it is plainer still that the courts may not

intervene to block subpoenas for bank records from the Legislative Branch, whose Members alone are expressly granted immunity by the Constitution.

Furthermore, the decision below cannot be upheld on the basis of any special circumstances regarding the Senate Subcommittee's investigation. There is nothing in this record—in the authorizing resolutions, in the nature of the inquiry, or otherwise—to indicate that this was anything but a legitimate legislative inquiry and the court majority did not suggest the contrary.

Nor does the record lend any support to respondents' claim that involved here is an attempt by the Congressional petitioners to evade court review by issuing subpoenas to banks who cannot be expected to resist and force contempt prosecutions. The subpoenas were issued to the owners and custodians of the documents and none of the courts below found any attempt to evade court review. Congress may invoke the aid of the judiciary in contempt prosecutions, but it does not follow that a Congressman's Speech or Debate Clause protection disappears when the complaining party may have no chance to defend a contempt prosecution. That was the situation in *Tenney* v. *Brandhove*, 341 U.S. 367, 371 (1951), yet this Court sustained the dismissal of the suit against the legislators despite plaintiff's claim that he had no other way to redress the alleged violation of his First Amendment rights.

As to the harm alleged by USSF, only last term this Court refused to allow courts to enjoin the IRS from revoking tax-exempt status to an organization claiming that if it could not sue for an injunction it would be irreparably harmed by the loss of donations. *Alexander*

v. "*Americans United*," *Inc.*, — U.S. — (1974) (94 S.Ct. 2053). The decision of the court of appeals in this case therefore cannot be upheld on the basis of USSF's allegations of similar harm if the bank complies with the subpoena, particularly since the bar to judicial intrusion is the Constitution itself.

II.

A.

USSF's First Amendment claims do not support withdrawal of Speech or Debate Clause protection. USSF's claim of associational privacy in the documents subject to the subpoena is tenuous at best. The records sought by the Subcommittee belonged to the bank, not USSF, and the courts in this country have never recognized a banker-customer privilege. Indeed, this Court has held that when the IRS issues a summons to a third party for checks, vouchers, bank statements and the like relating to a taxpayer, the taxpayer has no right to intervene and contest the summons. *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Couch* v. *United States*, 409 U.S. 322 (1973).

Moreover, the bank's records regarding its transactions with USSF are doubtless familiar to the bank and its employees. While USSF argues that this information must be kept secret from the Senate Subcommittee to protect the identity of USSF's donors, the fact is that USSF has already reported such information about its contribution on its federal tax returns. And those returns are currently available, upon request to the Secretary of the Treasury, to at least three other committees of Congress.

B.

Decisions such as *NAACP* v. *Alabama*, 357 U.S. 449 (1958), do not sanction judicial interference with the Congressional subpoenas at issue here. The bank's records are not the equivalent of the confidential membership lists of the NAACP, which were sought directly from the NAACP and which the NAACP evidently had not disclosed to other state government agencies or private entities. Moreover, in the *NAACP* v. *Alabama* line of cases the State authorities sought the lists for purposes that were not germane to their asserted need for them, which is not the situation here. In any event, when private civil actions are instituted against Congressmen, the Speech or Debate Clause prevents the courts from imposing liability on the Congressional defendants on the basis that, in the court's view, their legislative actions were not wholly necessary to their legislative task.

Nor can the decision below be upheld on the ground that Congressional subpoenas may not be issued to banks for records relating to "controversial" organizations. A distinction between "controversial" and "noncontroversial" organizations or persons is as unworkable as it is unsound. The very notion that by private suits against Members of Congress courts should supervise Congressional investigations, permitting "third party" subpoenas for financial records relating only to "noncontroversial" organizations, flies in the face of the Speech or Debate Clause principles established by this Court. The First Amendment, in any event, does not distinguish between "controversial" and "noncontroversial" organizations, conferring associational privacy only on the former.

In sum, the holding of the court below, if upheld, will have the inevitable effect of blocking legislative committees from legitimately inquiring, through the use of compulsory process, into the financing of any organization a court might deem "controversial." Yet such inquiries are properly part of the due functioning of the legislative process. If some legislative abuse might be perceived—and it is hardly apparent whether the court below saw any—that is a matter for Congress itself, not the judiciary, as this Court's decisions under the Speech or Debate Clause make clear.

ARGUMENT

At issue here is the authority of federal courts to control the fact-finding processes of the United States Congress through private civil actions against Members and their aides. Prior to the decision below, the judiciary had observed the fundamental doctrine that courts should "not lightly interfer[e] with Congress' exercise of its legitimate powers," *Hutcheson* v. *United States*, 369 U.S. 599, 622 (1962), and had refused to enjoin the issuance or enforcement of a Congressional subpoena before its return.[34]

But in a decision opening the doors to lawsuits that would cripple the process of legislative inquiry, the

[34] In a series of earlier decisions, which were not brought to this Court for review, the Court of Appeals for the District of Columbia Circuit—the only jurisdiction where such suits can be brought (see *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970))—consistently rejected injunction and declaratory judgment actions by plaintiffs asserting the First Amendment rights of subpoenaed witnesses called to testify or produce documents before Congressional committees. See *Pauling* v. *Eastland*, 288 F.2d 126 (1960); *Cole* v. *McClellan*, 439 F.2d 534 (1970); *Ansara* v. *Eastland*, 442 F.2d 751 (1971); *Sanders* v. *McClellan*, 463 F.2d 894 (1972). See also *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936).

court of appeals has breached this principle and authorized equitable relief against Congressional defendants. To justify this on the basis that the subpoena is addressed to a third party and the party asserting the constitutional claim thus may have no alternative method of obtaining judicial review prior to compliance, is to emphasize how far-reaching the intrusion promises to be. Congressional committees are constantly subpoenaing witnesses to testify or produce documents in regard to other persons or legal entities.[35] Yet those who are the subject of such inquiries are now invited to take Members of Congress to court, invoke a constitutional claim, and frustrate the legislative process in the interim while the case winds its way to final judgment. Now the courts will intervene so long as the plaintiff suing for injunctive relief is an organization or other "target" of the investigation whose interests will be affected by the testimony given or the documents produced and can claim, along the lines sustained below, that its constitutional objection will be lost if not considered by a court prior to compliance with the subpoena.

As we argue below, this extraordinary result violates well-established principles concerning the immunity of Congressmen and their aides from judicial control and cannot be justified on the First Amendment grounds invoked by the court of appeals.

[35] See Sky, *Judicial Review of Congressional Investigations: Is There An Alternative to Contempt?*, 31 Geo. Wash. L.Rev. 389, 408 (1963) (Mr. Sky was Assistant Counsel to the Antitrust Subcommittee of the House Judiciary Committee, *id.* at 399 n.*).

I.

The Activities of the Congressional Defendants in Subpoenaing Bank Records Were Protected from Judicial Interference by the Speech or Debate Clause

A.

Subpoenaing records and documents has long been considered something "generally done in a session of Congress by one of its members in relation to the business before it" and is therefore protected legislative activity

Article I, section 6 of the Constitution provides that "for any Speech or Debate in either House * * * [Senators and Representatives] shall not be questioned in any other place." On eight prior occasions this Court has considered questions relating to the scope and application of the Speech or Debate Clause. *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, 408 U.S. 501 (1972); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *United States* v. *Johnson*, 383 U.S. 169 (1966); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). The principles established in these cases govern the decision here and, we submit, lead to the conclusion that courts may not enjoin Congressmen and their aides from issuing or enforcing subpoenas, any more than courts may enjoin Congressmen from considering and passing legislation.

The reasons for the Speech or Debate Clause at the least suggest as much. Designed to prevent "intimidation by the executive and accountability before a possibly hostile judiciary,"[36] the Clause reinforces the

[36] *United States* v. *Johnson*, *supra*, 383 U.S. at 181; *Gravel* v. *United States*, *supra*, 408 U.S. at 617; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *Doe* v. *McMillan*, 412 U.S. at 311, 316.

separation of powers and protects legislative independence and integrity.[37] As to the judicial branch, the protection afforded by the Clause is "not only from the consequences of litigation's results but also from the burden of defending" suits.[38] Indeed, the Clause "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon the conclusions of a pleader," *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377.[39]

Never in its history has this Court allowed a civil suit, challenged under the Speech or Debate Clause, to proceed against Senators or Representatives. In each of the prior cases raising the question whether allegedly unconstitutional actions by legislators subjected them to such suits, the Court has held that the legislators should be dismissed as parties.[40] Moreover, while

[37] *United States* v. *Johnson*, *supra*, 383 U.S. at 178; *United States* v. *Brewster*, *supra*, 408 U.S. at 525; *Gravel* v. *United States*, *supra*, 408 U.S. at 617.

[38] *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377; *Powell* v. *McCormack*, *supra* 395 U.S. at 502-503, 505.

[39] The Speech or Debate Clause was adopted by the Founders without debate or opposition. See 5 Debates on the Federal Constitution 406 (Elliot ed. 1876); 2 Farrand, Records of the Federal Convention of 1787, p. 246 (1966 ed.). The historical antecedents of the Clause are discussed in Mr. Justice Frankfurter's opinion for the court in *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 372-375; and in *United States* v. *Johnson*, *supra*, 383 U.S. at 177-183 (Mr. Justice Harlan). See also *Powell* v. *McCormack*, *supra*, 395 U.S. at 502-503; and *Gravel* v. *United States*, *supra*, 408 U.S. at 652-659 (Mr. Justice Brennan, dissenting).

[40] See *Kilbourn* v. *Thompson*, *supra*; *Tenney* v. *Brandhove*, *supra*; *Dombrowski* v. *Eastland*, *supra*; *Powell* v. *McCormack*, *supra*; *Doe* v. *McMillan*, *supra*. (The remaining three Speech or Debate Clause cases involved criminal proceedings (*United States* v. *Johnson*, *supra*; *United States* v. *Brewster*, *supra*; *Gravel* v. *United States*, *supra*.))

at one time there may have been some doubt regarding the extent to which the Clause applied to Congressional aides,[41] the Court ruled unanimously in *Gravel* v. *United States*, *supra*, 408 U.S. at 618,[42] "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[43]

In this, as in other cases involving the Clause, the Court has determined "that the legislative privilege will be read broadly to effectuate its purpose."[44] Although the Clause speaks only of "Speech or Debate" the Court has never so confined its protections.[45] Instead, whether Congressmen—and, therefore, their aides—are covered in the context of a civil suit depends on whether the challenged conduct constitutes something "generally done in a session of the House by one of its members in relation to the business before it."[46]

---

[41] Compare *Kilbourn* v. *Thompson*, *supra*; *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Powell* v. *McCormack*, *supra*.

[42] See also *id.* at 629 (Mr. Justice Stewart, dissenting in part); at 633 (Mr. Justice Douglas, dissenting); and *id.* at 648 (Mr. Justice Douglas and Mr. Justice Marshall, dissenting).

[43] Accord *Doe* v. *McMillan*, *supra*, 412 U.S. at 320.

[44] *United States* v. *Johnson*, *supra*, 383 U.S. at 180; *Gravel* v. *United States*, *supra*, 408 U.S. at 618, 624; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

[45] *Gravel* v. *United States*, *supra*, 408 U.S. at 617; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502.

[46] *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204, quoted with approval in *United States* v. *Johnson*, *supra*, 383 U.S. at 179; *United States* v. *Brewster*, *supra*, 408 U.S. at 509, 512-513; *Gravel* v. *United States*, *supra*, 408 U.S. at 617-618; 649-650 (dissenting opinion); *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

In the instant case, the only activity suggested by the court below as being a non-legislative act—subpoenaing records[47]—falls squarely within the foregoing definition of protected conduct consistently repeated by this Court. As the Court stated in *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927), "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."

Requiring the production of documents is not only "essential," but also something "generally done" in a legislative session. Indeed, there are few other attributes of the legislative process that historically are so firmly ingrained. When in 1689 British Parliamentary committees first were employed as necessary parts of the legislative process they were granted the power to send for persons and papers.[48] English history is replete with other examples from that time forward, so much so that one commentator concluded a century ago that "it is hardly worthwhile to enumerate later instances of exercising a right which had become indisputable and, even before it rested on the basis of precedent, could not reasonably be denied to those who might advise, remonstrate, and impeach."[49] In short, a "legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivalling most legislative institutions in the antiquity of its origin."[50]

---

[47] App. 67.

[48] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 162-164 (1926).

[49] *Hallam, Constitutional History of England*, 307-308 (5th ed. 1867), quoted in Landis, *supra*, at 164 & n.44.

[50] Landis, *supra*, at 159.

In the early history of this country, as in England, requiring, and enforcing process to compel, the production of documents was something "generally done" by a legislative body "in relation to the business before it." [51] In 1781 the Virginia House of Delegates, for example, conferred upon its standing committees on religion, privileges, and elections, courts of justice, and trade, the power "to send for persons, papers and records for their information." [52] And the first Congressional investigating committee, established in 1792, exercised the power "to call for such persons, papers and records, as may be necessary to assist their inquiries" [53] into the ambush and defeat of General St. Clair's army a year earlier.[54]

From the time of the General St. Clair investigation [55] through the recent Watergate hearings [56] Congressional committees have compelled the attendance of witnesses and the production of books and records.[57] And in view of the fact that the earliest Parliamentary

[51] See generally, Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U.Pa.L.Rev. 691 (1926).

[52] Potts, *supra*, at 716.

[53] 3 Ann. Cong. 490-494 (1792).

[54] See I Morrison, Commager & Leuchtenburg, *The Growth of the American Republic* 305-306 (6th ed. 1969).

[55] See, *e.g.*, the other examples cited and discussed in Landis, *supra*, at 168-212.

[56] See *Hearings before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess. (1973); S. Res. 60, 93d Cong., 1st Sess., § 3(a)(5) (1973).

[57] It has been estimated that from 1792 to 1954 there have been 600 special Congressional investigations alone. Van Alstyne, *Congressional Investigations*, 15 F.R.D. 471, 472 (1954).

inquiries,[58] as well as the first Congressional investigation, were devoted to investigations into the conduct of the military, it is perhaps ironic that in this case the Senate Subcommittee's investigation, which dealt with USSF's activities affecting servicemen, touched on the same subject.

In sum, as this Court stated in *McGrain* v. *Daugherty*, 273 U.S. 135, 161 (1927), "power to secure needed information by [compulsory process] has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislatures before the American Revolution and a like view has prevailed and been carried into effect in both houses of Congress * * *." This history demonstrates that the Congressional actions challenged here—seeking the production of documents through a subpoena *duces tecum*—are well-within the protection of the Speech or Debate Clause. These surely are—and for centuries have been—activities "generally done in a session of the House by one of its members in relation to the business before it." [59] They are essential acts in the legislative fact-finding process without which Congressional committees could not effectively function, and plainly are not "beyond the apparent needs of the '*due* functioning of the [legislative] process.'" *Doe* v. *McMillan*, *supra*, 412 U.S. at 317, quoting *United States* v. *Brewster*, *supra*, 408 U.S. at 516.

[58] Landis, *supra*, at 162.

[59] Cases cited note 46 *supra*.

B.

The Speech or Debate Clause cannot be disregarded because the congressional activity might be found unconstitutional by a court or because the subpoena was directed to a third party who could be expected to comply

As against this, the court below quoted extensively from the decisions of this Court regarding the Speech or Debate Clause and suggested in conclusion that the Senators and Chief Counsel of the Subcommittee had no protection *because* "the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs" (App. 78). Aside from the fact that the record is barren of any evidence that the Senators would have had to "force" the bank to comply, the court's rationale for disregarding the Clause is erroneous.

To hold that the Clause provides no protection to Congressmen if their actions are found to be unconstitutional is to emasculate the Clause itself. It means that Congressional defendants would come under the Clause only if they would in any event prevail on the merits, which of course is no protection at all. This is why the Court ruled in *Tenney* v. *Brandhove, supra*, 341 U.S. at 377, that legislators cannot be forced to defend actions "upon a conclusion of the pleader"; otherwise "the privilege would be of little value."[60]

[60] As Mr. Justice Rehnquist (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Blackmun) stated in his concurring and dissenting opinion in *Doe* v. *McMillan, supra*, 412 U.S. at 339:

> A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed.

Contrary to the majority below (App. 60), it is no answer to say that the rule must be different when, as here, a party seeks judicial intervention on the basis that the subpoena is directed to a third party, who can be expected to comply, and that such compliance would invade plaintiff's constitutional rights in view of the purpose and effect of the subpoena. As this Court has held,[61] "The claim of an unworthy purpose does not destroy the privilege."[62] Congressmen and their aides are immune from suit "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional * * *." *Doe* v. *McMillan, supra*, 412 U.S. at 312-313. That the Speech or Debate Clause, if applied, would preclude respondents from invoking the aid of the judiciary is not a reason for holding the Clause inapplicable.[63] It is instead merely a restatement of the principle, established by this Court, that the Clause confers immunity upon Congressional defendants for their legislative activities,

[61] *Tenney* v. *Brandhove, supra*, 341 U.S. at 377; the Court continued after the quoted passage: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators."

[62] See the amended complaint in *USSF* (App. 16), which alleged that the "sole purpose for the issuance of the aforesaid subpoena by defendant Committee members and staff is to harass, chill, punish and deter plaintiffs" in the exercise of their First Amendment rights.

[63] Compare the statement by the court of appeals majority (App. 60):

> *Here the plaintiffs have no alternative means to vindicate their rights.* They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.

regardless whether a court might determine upon a trial that their actions were unconstitutional.

Nor is the following dictum from *Gravel* v. *United States*, *supra*, 408 U.S. at 621, relied upon by the court of appeals,[64] to the contrary:

> On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States* v. *Johnson*, 383 U.S. 169 (1966).

As the Court there explained, no Speech or Debate Clause protection attaches because in such circumstances "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Ibid.*

By contrast, a trial such as that contemplated by the court below necessarily entails an inquiry into the purposes or motives of the Congressmen responsible for the subpoena since otherwise there could be no constitutional objection. Surely the mere fact that a bank's records relating to a corporation have been subpoenaed does not render unconstitutional the underlying actions by the Congressional defendants or supply a reason for judicial intervention. In analogous contexts the lower federal courts have held on numerous occasions that "customers have no standing to

[64] App. 64-65, 78.

object to subpoenas requiring their bank to produce records of the customers' accounts," *Harris* v. *United States*, 413 F.2d 316, 318 (9th Cir. 1965) (citing cases). Thus, when independent agencies such as the Securities Exchange Commission[65] or agencies of the Executive Branch such as the IRS[66] or arms of the Judicial Branch[67] such as a grand jury[68] seek access to bank records, the customer has no standing to protest in court.[69]

This being so when agencies of the Executive and Judicial Branches issue subpoenas for bank records, it is plainer still that there can be no judicial interference with such subpoenas *duces tecum* from the

[65] *E.g.*, *Galbraith* v. *United States*, 387 F.2d 617 (10th Cir. 1968) (SEC civil investigation).

[66] *E.g.*, *O'Donnell* v. *Sullivan*, 364 F.2d 43 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966) (IRS summons); *Application of Cole*, 342 F.2d 5, 8 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965).

[67] *Levine* v. *United States*, 362 U.S. 614, 617 (1960).

[68] *E.g.*, *Harris* v. *United States*, *supra*.

[69] See also *McMann* v. *SEC*, 87 F.2d 377, 378-379 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937), where Judge Learned Hand refused to enjoin stockbrokers from complying with an SEC subpoena *duces tecum* seeking copies of McMann's account. In response to plaintiff McMann's arguments that the information was privileged, confidential and constitutionally protected, Judge Hand stated:

> But the very fact that testimonial privileges are based upon specified confidential relations, is proof that they do not extend to all, and it hardly needs to be said that nobody by contract, express or implied, can abridge public duties. So far as the principal's rights may be classed as "property" at all, they are subject to this condition. The attempted investigation may indeed lack legal sanction. *Hearst* v. *Black* (App. D.C.) 87 F.(2d) 68; *Brex* v. *Smith*, 104 N.J.Eq. 386, 388, 146 A.34; and the officer who conducts it will then stand no better than any other interloper; but if it be duly authorized, it is no more subject to obstruction than judicial proceedings.

Legislative Branch, whose Members alone are explicitly granted immunity by the Constitution.[70] No exception in regard to the Senate Subcommittee's subpoena in this case can be justified on the basis of USSF's charges that the "sole purpose for the issuance of the * * * subpoena by the defendant Committee members and staff is to harass, chill, punish and deter plaintiffs in the exercise of their rights and duties under the First Amendment."[71] The invitation for judicial inquiry extended by such claims[72] cannot be accepted since the Speech or Debate Clause forecloses the courts from examining the reasons why Members of Congress and their aides have chosen to engage in the questioned legislative activity.[73]

[70] The Court has of course upheld immunity for the judiciary in *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967), stating: "This immunity applies even when the judge is accused of acting maliciously and corruptly * * *." See also *O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

[71] Amended Complaint ¶ III, 13 (App. 16). Similarly, the next paragraph claimed that the Subcommittee's subpoena "is part of a broad scheme by various branches of the Government to use and abuse the power of subpoena to stifle freedom of the press * * *." *Ibid.*

[72] These allegations by USSF are quite similar to those made by the plaintiff in *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 371, where this Court affirmed the district court's dismissal of the complaint.

[73] *United States* v. *Brewster*, *supra*, 408 U.S. at 525, 528 ("It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."); *id.* at 534-535 (Mr. Justice Brennan, joined by Mr. Justice Douglas, dissenting); *Gravel* v. *United States*, *supra*, 408 U.S. at 621 (in suits against Congressmen and their aides, the Clause precludes inquiry into the "motives or purposes underlying" legislative acts); *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377 (it is "not consonant with our scheme of government for a court to inquire into the motives of legislators").

Moreover, despite USSF's allegations,[74] there is nothing in this record—in the authorizing resolutions, in the nature of the inquiry or otherwise—to indicate that the Senate Subcommittee's investigation into bank records relating to USSF was anything but a legitimate legislative investigation and, indeed, the court majority never suggested the contrary. As Judge MacKinnon pointed out in dissent (App. 96-97):

> The Subcommittee and the Congress have a valid legislative interest in ascertaining whether any of the money used to finance any questionable activities of the USSF came from foreign sources or subversive organizations. The activities of coffee houses and newspapers supported by the USSF were designed to, and could not possibly have failed to some extent "to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States." Such activities might have caused or attempted to cause insubordination, disloyalty, or refusal of duty, and as such would have constituted violations of 18 U.S.C. § 2387(a) * * *.
>
> If some of the contributors to the USSF were from "foreign principals," there was a definite congressional interest in determining whether the Foreign Agents Registration Act had been complied with. 22 U.S.C. § 611 *et seq.* Compliance with the Internal Security Act, 50 U.S.C. § 781 *et seq.*, as the enabling resolution stated, was also a legitimate objective of the investigation by the Subcommittee. In addition, the subject matter of these statutes was also a legitimate subject of congressional inquiry in order to determine whether these laws should be retained, repealed or amended to meet new conditions, or whether new laws were needed. It would also be a permissible goal of the

[74] See text at note 71 *supra*.

investigation to determine whether any of the contributors has been misled by the use of the name "United States" in the name of the organization into believing that the USSF was sponsored or approved by the Government of the United States or by the United States Military services or any other United States department or agency. Cf. 18 U.S.C. § 713.

The condition and efficiency of the military is a matter of vital concern to Congress, particularly when large scale foreign military operations, such as were under way in 1970, were being undertaken.[75]

Of course, it is immaterial that the authorizing resolutions did not identify whether or what legislation was contemplated by the Senate Subcommittee since "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[76]

Respondents have also told this Court that what is involved here is a legislative attempt "to evade court review by issuing subpoenas to third parties who can-

[75] The criminal statute (18 U.S.C. § 2387(a)), cited by Judge MacKinnon, provides:

> (a) Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; or
>
> Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so—
>
> Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[76] *In re Chapman*, 166 U.S. 661, 670 (1897).

not be expected to run the risk of contempt to protect the constitutional rights of the real party in interest * * *."[77] But the subpoenas were in no way "indirect": they were issued to the owners and custodians of the documents involved.[78] None of the courts below found any "attempt to evade court review" and the record lends no support to such an assertion. Moreover, it simply does not follow that because Congress can seek the aid of the judiciary through contempt prosecutions instituted by the Department of Justice,[79] the judiciary should ignore the Speech or Debate Clause and permit suits against Members of Congress when the "opportunity" to defend a contempt prosecution is unlikely or unavailable.[80] That was precisely the situation in *Tenney* v. *Brandhove, supra,* where this Court affirmed the trial court's dismissal of a private civil action against legislators despite the fact that the plaintiff had no other way to redress the legisla-

[77] Brief in Opposition to the Petition for a Writ of Certiorari, p. 18.

[78] The Senate Subcommittee could hardly have sought production of the bank's records by directing a subpoena to USSF. There is, for example, nothing to indicate that USSF retained copies of checks deposited with the bank that were payable to USSF.

[79] See 2 U.S.C. 192, 194; *Watkins* v. *United States*, 354 U.S. 178 (1957); *Uphaus* v. *Wyman*, 360 U.S. 72 (1959); *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

[80] The implicit premise of respondents' argument—that there must always be an opportunity for judicial review of legislators' actions allegedly violating constitutional rights—has been expressly rejected by this Court not only in *Tenney* v. *Brandhove, supra,* but also in *Doe* v. *McMillan, supra*, 412 U.S. at 312-313 (Speech or Debate Clause immunity protects Congressmen "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional.").

tors' alleged infringement of "his constitutional rights of free speech." 341 U.S. at 371.[81]

USSF further claims that the protection of the Speech or Debate Clause should be withdrawn to allow judicial intervention because otherwise the bank's compliance with the Senate Subcommittee's subpoena will result in a decrease of donations to USSF. Only last term this Court dealt with a similar contention and rejected it. In *Alexander* v. *"Americans United," Inc.*, — U.S. — (1974) (94 S. Ct. 2053),[82] a non-profit cor-

[81] See in addition to note 73, *supra*, Mr. Justice Douglas dissenting in *Gravel* v. *United States*, *supra*, 408 U.S. at 635-636:

> Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman*, 360 U.S. 72; *Kilbourn* v. *Thompson*, *supra*, at 190.
>
> In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove*, 341 U.S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

See also *Fischler* v. *McCarthy*, 117 F. Supp. 643, 650 (S.D.N.Y.), aff'd, 218 F.2d 164 (2d Cir. 1954) (per curiam) (the "legislature cannot be compelled to submit to the prior approval and censorship of the judiciary before it may ask questions or inspect documents through its investigating subcommittees, or even before it enacts legislation * * * any more than the judiciary can be compelled by the legislature to submit its rulings or decisions for legislative approval.").

[82] See also *Bob Jones University* v. *Simon*, — U.S. — (1974) (94 S.Ct. 2038).

poration sought injunctive and declaratory relief against the IRS's revocation of its federal tax-exemption, claiming *inter alia* that the government's action violated plaintiff's First Amendment rights, that contributions to the organization would decrease as a result and that as a practical matter only an injunction could prevent this injury. Although recognizing that the organization would be irreparably harmed, this Court held that the Anti-Injunction Act (26 U.S.C. 7421(a)) barred judicial intervention and that the "constitutional nature" of the organization's claim was of no consequence. 94 S.Ct. at 2058-2059. Likewise, the decision below cannot be justified on the basis that USSF's contributions may diminish. The bar to court action here is not simply a federal statute but a constitutional provision—the Speech or Debate Clause —and, as we have argued above, the challenged activities of the Congressional defendants fall squarely within the protection of that constitutional provision.

II.

The Subcommittee's Actions Were Not Transformed Into Non-Legislative Acts, Barred by the First Amendment, Merely Because Its Subpoena to the Bank Would Have Disclosed Records Relating to USSF

A.

USSF's claim of associational privacy in the bank's records is tenuous and does not justify a court's withdrawing Speech or Debate Clause protection to allow civil suits against congressmen and their aides

While what has been said above demonstrates, we submit, that the Speech or Debate Clause forecloses civil actions against Congressmen and their aides in the circumstances presented here, respondents' First Amendment claims illustrate even further the error

of the court below and the problems of judicial administration that adherence to its decision would entail.

It is important to emphasize that the records sought here by the Subcommittee belonged to the bank, not USSF, and the subpoena for them did not transgress any legal privilege such as attorney-client or doctor-patient or the expectation of privacy that arises from these relationships. Whatever the practice in Switzerland, the courts in this country have never recognized a banker-customer privilege.[83] See *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974).

In *Donaldson* v. *United States*, 400 U.S. 517 (1971), which involved an IRS summons directed to a third-party seeking checks and vouchers relating to the taxpayer, the Court held that the taxpayer could not intervene because he had "no proprietary interest of any kind" in the material sought and his only interest was to overcome the third-party's "willingness, under summons, to comply and to produce records." *Id.* at 531-532.[84] The records sought in *Donaldson* were of course the same kind of records sought by the Congressional subpoenas here. Indeed, even when a taxpayer relinquishes only custody, not ownership, of

[83] See in addition to the cases cited at notes 65 to 69, *supra*, *Foster* v. *United States*, 265 F.2d 183, 187-188 (2d Cir. 1959), *cert. denied*, 360 U.S. 912; *United States* v. *Bank of Commerce*, 405 F.2d 931, 934 (3d Cir. 1969) (disapproved in *Donaldson* v. *United States*, 400 U.S. 517, 530 (1971), on the ground that the taxpayer-customer has no right of intervention); *Schultz* v. *Rayunce*, 350 F.2d 666 (7th Cir. 1965), *cert. denied*, 382 U.S. 919; *United States* v. *Gross*, 416 F.2d 1205, 1212-1213 (8th Cir. 1969) (opinion by Mr. Justice—then Judge—Blackmun).

[84] See also *Couch* v. *United States*, 409 U.S. 322 (1973), holding that the taxpayer could not intervene in an IRS summons proceeding to prevent her accountant from producing her "books, records, bank statements, cancelled checks" and other documents, despite the taxpayer's contention that this material was confidential and privileged.

these kind of records to a third party, the Court has refused to recognize any right of the taxpayer to prevent the third party's turning the records over to the IRS pursuant to a summons. *Couch* v. *United States*, *supra*. In language that is as applicable to the United States Congress as it was to the IRS, the Court in *Donaldson* concluded that if taxpayers had a right to intervene when the summons sought production of such records from a third party, it "would unwarrantedly cast doubt upon and stultify the Service's every investigatory move." *Ibid.*[85]

Moreover, the bank's records regarding its financial transactions with USSF are doubtless familiar to the bank, including its officers and its numerous employees. If the bank chose to produce the information voluntarily, without subpoena, there would be no basis for a constitutional claim. On what ground, then, is there a greater invasion of the right of free association if compulsory process is used to obtain the information voluntarily disclosed to the commercial institution? Indeed, USSF's argument that the Senate Subcommittee is barred from obtaining this information because of the effect on donations, turns not at all on how the Subcommittee would discover the data. The argument brooks no distinction between the bank subpoena here or, for example, voluntary testimony about USSF's finances from one of its former officers. It is a claim for an absolute shield, erected by the courts, preventing any Congressional investigation that would uncover information about the organization's financing

[85] See also Mr. Justice Douglas' concurring opinion, 400 U.S. at 537: "But it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." (Mr. Justice Douglas' remarks were directed to claims under the Fourth or Fifth Amendments.)

even when, as here, there is nothing to show that the investigation was other than a legitimate legislative inquiry. It is a claim which, if upheld, would thrust the judiciary into the position of supervising the due functioning of the legislative branch in civil actions against its Members—precisely what the Speech or Debate Clause was designed to prevent.

In addition to the facts that the bank and its employees are familiar with the information USSF desires to keep from Congress and that the bank's records could be discovered by other investigative bodies, as we discussed above,[86] USSF has undoubtedly already disclosed some of this information in its annual federal tax returns since a tax-exempt corporation must list contributions over $5,000 and the names and addresses of these contributors.[87] The only donor USSF claimed to have lost after the Subcommittee issued its subpoena had been contributing $10,000 per year.[88] (It appears just as likely, indeed far more likely, that this donor ceased giving to USSF because of the IRS's threatened revocation of USSF's tax-exemption, which had been publicized.[89]) The information on USSF's tax returns with respect to this donor and others in the same class is already available to at least three Com-

[86] See pp. 30-32, 38 *supra*.

[87] See Treas. Reg. 1.6033-2(a)(ii)(f)(1974) (on its annual information return, the tax exempt organization must list "The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year.")

[88] See note 17 *supra*.

[89] See note 19 *supra*. As to the effect of revocation of tax-exempt status on contributions to a non-profit organization, see *Bob Jones University* v. *Simon*, *supra*; and *Alexander* v. *"Americans United," Inc.*, *supra*.

mittees of Congress upon their request to the Secretary of the Treasury.[90]

Thus, the Senate Subcommittee's actions in this case were not transformed into non-legislative acts, prohibited by the First Amendment, merely because its subpoena to the bank would have disclosed records relating to USSF. As in *Uphaus* v. *Wyman*, 360 U.S. 72, 80 & n.7 (1959), where a state legislative committee sought the guest lists of an organization which had maintained a somewhat less extensive guest register open to inspection by police authorities, USSF's claim of associational privacy with respect to the documents covered by the subpoena is "tenuous at best."

B.

This Court's decisions on freedom of association do not support the judgment of the Court of Appeals authorizing injunctions against the congressional defendants to prevent receipt of the subpoenaed bank records

Decisions such as *NAACP* v. *Alabama*, 357 U.S. 449 (1958),[91] holding that it would infringe upon the freedom of association for state authorities to compel dis-

[90] See 26 U.S.C. 6103(d)(1)(A), which provides:

> The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

The Joint Committee on Internal Revenue Taxation has the same right to obtain data and inspect returns and may submit relevant or useful information so obtained to the Senate or the House. 26 U.S.C. 6103(d)(2).

[91] See *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

closure of the NAACP's membership lists, do not support a contrary conclusion. For the reasons discussed above, the bank's records sought here are hardly the equivalent of confidential membership lists, which were sought directly from the NAACP or its employees and which the NAACP evidently had not given, in whole or in part, to other state authorities or private entities.

Moreover, the state officials in those cases sought the NAACP's membership lists for improper purposes in view of the lack of connection between the lists and the state's asserted need for them, as the record revealed.[92] There is no such proof here, nor could there be in view of the prohibition in the Speech or Debate Clause against judicial scrutiny of a Congressman's purpose or motive in performing his legislative activities.[93] In addition, *Doe* v. *McMillan*, *supra*, 412 U.S. at 312, makes clear that legislative immunity attaches regardless whether a court might decide that the legislator's acts were not wholly necessary. In response to the argument that the defendant Congressmen violated plaintiffs' constitutional rights by inserting in their report confidential material that was "unnecessary and irrelevant to any legislative purpose," the Court there stated: "Cases in this Court, however, from *Kilbourn* to *Gravel* pretermit the imposition of liability on any such theory. * * * Although we might disagree with the Committee as to whether it was nec-

[92] See, *e.g.*, *Gibson* v. *Florida Legislative Investigating Committee*, *supra*, 372 U.S. at 551. As this Court stated in *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972), distinguishing the *NAACP* v. *Alabama* line of cases, "Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether a crime had been committed * * *."

[93] See note 73 *supra*.

essary, or even remotely useful, to include [the material in the report], we have no authority to oversee the judgment of the Committee in this respect or to impose liability on its Members if we disagree with their legislative judgment." 412 U.S. at 312-313.[94]

Relying upon the *NAACP* v. *Alabama* line of cases, the court below[95] and respondents in this Court[96] draw a line between Congressional subpoenas for banks' records relating to "controversial" organizations and subpoenas regarding "non-controversial" organizations, finding only the latter constitutionally permissible. The obvious unworkability of such a distinction, without more, suggests its unsoundness.[97] Beyond this, the proposal that courts should supervise Congressional investigations to allow "third-party" subpoenas for financial information regarding only "noncontrover-

[94] This is why the Court below erred in relying upon *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd*, 393 U.S. 14, a case in which a state prosecutor, acting as a one-man grand jury, subpoenaed bank records relating to the Arkansas Republican Party. The district court expressly rested its decision enjoining the State prosecutor on the ground that the information sought was not "reasonably relevant to defendant's investigation of vote buying," 283 F. Supp. at 257, and this Court affirmed without opinion.

[95] App. 68-75.

[96] Brief in Opposition to the Petition for a Writ of Certiorari, pp. 3, 19, 19A.

[97] For example, do the bank's records regarding USSF become proper objects of a Congressional subpoena if USSF loses its alleged controversiality with the passing years? The very fact of a Congressional investigation may render otherwise obscure organizations "controversial." Does this sanction a court's intervention? Cannot trade associations or labor unions be considered "controversial" in some circumstances? Is it not true that the very facts that render a group "controversial" may properly spur a Congressional investigation? What are the standards a court should use to decide whether an organization is "controversial"?

sial" organizations flies in the face of the Speech or Debate Clause principles established by this Court in the series of decisions discussed above.[98] And in any event, this dichotomy between organizations deeming themselves "controversial" and those outside the classification cannot serve to distinguish the circumstances presented here from the usual case involving the subpoenaing of bank records; this Court has never held that corporations such as USSF have any greater First Amendment rights than others.

In sum, the holding of the court of appeals will have the inevitable effect of blocking legislative committees from legitimately inquiring, through the use of compulsory process, into the financing of any organization that a court might term "controversial." Surely the question whether, for example, tax-exempt organizations are funded directly or indirectly by agents of foreign governments is one that Congress has the power and responsibility to investigate. Exposure of such financing may, as USSF argued below, deter financial contributions to these organizations, particularly if the donor is in fact connected with a foreign government; yet on that ground alone the court of appeals has now held that Congress is barred from learning the facts. If the court below perceived some abuse, which is hardly apparent from the record or its opinion, that is a matter for Congress, not the judiciary, as this Court's decisions under the Speech or Debate Clause have made clear.[99] In all this, it is well to recall the

[98] See pp. 22-37 *supra*.

[99] See, e.g., *Tenney* v. *Brandhove*, *supra*, 408 U.S. at 378, where the Court stated:

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or corrupting such abuses.

admonishment of Mr. Justice Holmes years ago: "it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904).

See also *Doe* v. *McMillan*, *supra*, 412 U.S. at 312-313; *Gravel* v. *United States*, 408 U.S. at 636 (Mr. Justice Douglas, dissenting: "If there is an abuse there is a remedy; but it is legislative, not judicial."); *United States* v. *Brewster*, *supra*, 408 U.S. at 534-535 (Mr. Justice Brennan, joined by Mr. Justice Douglas, dissenting).

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed and respondents' suits ordered dismissed.[100]

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Attorneys for Petitioners

---

[100] Respondents have argued in this Court that the House Committee cases are moot because the subpoenas are four years old, the Session of Congress has expired, and, unlike the Senate, the House is not a continuing body.

Respondents did not present this argument to the court of appeals although it was equally applicable at that time. We suggest that if respondents are correct, the proper course is for this Court to vacate as moot the judgment below relating to the House cases. This disposition would not of course affect the *USSF* case.

In any event, we do not believe the House cases are moot. The Committee would have been flouting the judiciary if it had repeatedly issued subpoenas with respect to which preliminary injunctions had been entered (*supra* note 29).

JAN 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, *et al.*,
Petitioners,

UNITED STATES SERVICEMEN'S FUND, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

NATIONAL PEACE ACTION COALITION, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

PROGRESSIVE LABOR PARTY, *et al.*

JOINT BRIEF OF RESPONDENTS

NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, N. Y. 10003

JEREMIAH S. GUTMAN
c/o American Civil Liberties Union Foundation
363 Seventh Avenue
New York, N. Y. 10001

Attorneys for Respondents

INDEX

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. RESPONDENTS' BANK RECORDS ARE PROTECTED BY THE FIRST AMENDMENT 10

A. Membership Lists And Other Compendia Of Personal Identities, Including Those In The Form Of Bank Records, Are Beyond The Reach Of The Subpoenas At Issue 10

B. The Absence Of A Privileged Relationship Between The Banks To Whom The Subpoenas Were Addressed And The Respective Respondent-Depositors Does Not Render The Bank Records Amenable To Subpoenas..... 18

C. The Absence Of An Over-riding And Compelling State Interest For Securing The Data Requires Invalidation Of The Subpoenas 25

D. The Subpoenas Are Overbroad And Therefore Void 35

Index Continued

E. The Fact That The Data Which The Respondents Seek To Protect And Petitioners Seek To Invade May In Part Be On File With The Internal Revenue Service Does Not Destroy Respondents' First Amendment Rights..... 37

II. THE SPEECH OR DEBATE CLAUSE DOES NOT PREVENT COURTS FROM CONSIDERING THE CONSTITU - TIONALITY OF A CONGRESSIONAL COMMITTEE SUBPOENA BEFORE COMPLIANCE WHEN A FAILURE TO GIVE SUCH CONSIDERATION WOULD IN AND OF ITSELF RESULT IN SERIOUS DEPRIVATION OF FIRST AMENDMENT RIGHTS..... 39

A. Federal Courts Are Constitutionally Required In Appropriate Cases To Pass Upon The Constitutionality Of Congressional Subpoenas... 40

B. The Speech Or Debate Clause Does Not Immunize From Judicial Review All Allegedly Unconstitutional Acts By Members Of Congress And Their Aides..... 41

C. The Actions Challenged In This Litigation Are Neither Speech Nor Debate.... 51

CONCLUSION 61

CITATIONS

Cases:

Alexander v. Americans United , ___ U.S. __, 94 S.Ct. 2053 (1974) 61,62
Ansara v. Eastland, 442 F.2d 751 (D.C. Cir., 1971)....55,56,57,58 61,62
Bates v. City of Little Rock, 361 U.S. 516 (1960)..... 11
Burroughs v. Superior Court of San Bernadino County, #20308 (Cal. Sup. Ct., Dec. 27, 1974)... 22
California Bankers Association v. Schultz, 416 U.S. 21, 94 S.Ct. 1494 (1974).....18,20
Couch v. United States, 409 U.S. 322 (1973).....18,19
Doe v. McMillan, 412 U.S. 306 (1973).....42,51,52,53
Dombrowski v. Eastland, 387 U.S. 82 (1967).....43,47
Donaldson v. United States, 400 U.S. 517 (1971).....18,19
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).....12,14,26,28,29,31,34
Gojack v. United States, 384 U.S. 702 (1966).....31,40
Gravel v. United States, 408 U.S. 606 (1972).....42,43,45,50

Kilbourn v. Thompson, 103 U.S. 168 (1881)..... 43,47
Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293 (1961).... 12,14
McSurely v. McClellan, No.23,845 (D.C.Cir.,March 26, 1970)..... 57
NAACP v. Alabama, 357 U.S. 449 (1958).....11,14,25,33
NAACP v. Button, 371 U.S. 415 (1963)..... 37
Pollard v. Roberts, 283 F.Supp. 248 (E.D.Ark. 1968), aff'd per curiam, 393 U.S. 14(1968)..... 12
Perlman v. United States, 247 U.S. 7 (1918)..... 59
Powell v. McCormack, 395 U.S. 486 (1969).....42,43,45,46,50
Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972)..... 58
Speiser v. Randall, 357 U.S. 513 (1958)..... 23
Tenney v. Brandhove, 341 U.S. 367 (1951)..... 43
United States v. Brewster, 408 U.S. 501 (1972).....42,52
United States v. Johnson, 383 U.S. 169 (1966).....43,44
United States v. Nixon, ___U.S. ___, 94 S.Ct. 3090 (1974)..... 59
United States v. Rumley, 345 U.S. 41(1953)..... 40
Watkins v. United States, 354 U.S. 178(1957).....31,40
Yellin v. United States, 374 U.S. 109 (1963).....31,40

Constitution and Statutes:

Art.I, Sec.6, Cl. 1 ..... passim
First Amendment ..... passim
Fifth Amendment 19

26 U.S.C. 6103(d)(1)(A)..... 39

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO. 73-1923

JAMES O. EASTLAND, et al., Petitioners

UNITED STATES SERVICEMEN'S FUND, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

NATIONAL PEACE COALITION, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

PEOPLES COALITION FOR PEACE AND JUSTICE, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

PROGEESSIVE LABOR PARTY, et al.

JOINT BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

Can a court, at the instance of a membership organization and in the absence of a showing that the records are unavailable from the membership organization itself, enjoin enforcement or declare invalid a Congressional Committee subpoena directed to a bank seeking records of all deposits, withdrawals and other transactions by the membership organization?

May such a judgment issue as against the Senators and Congresspersons themselves?

May such a judgment issue as against Congressional staffpersons?

STATEMENT OF THE CASE

Respondents, pursuant to Rule 40 Subdivision 3 of the Supreme Court Rules, deem necessary only the following corrections of inaccuracies and omissions in the statement of the case provided by petitioners.

Respondents did before the District Court and the Court of Appeals brief and argue the invalidity of the underlying resolutions pursuant to which the subpoenas were issued by the committees respectively.

The rationale of the petitioners in all cases and of Judge MacKinnon in his dissent sounds in the theory of right of governmental self protection. No showing was made, or attempted or

could be made that the information sought could not have been obtained from the records of the organizations themselves. Respondents would thus have been able to resist directly any subpoena served upon them. Petitioners chose, however, the indirect method of issuing and serving subpoenas upon four banks into which the organizations had respectively deposited their contributions. The petitioners cannot and do not deny that the respondents have complete records and documents embodying all of the data sought.

At the hearing, it was established (Appellants App. 229 ff.)* and the Court of Appeals found

*Appellants App. refers to Appellant's Appendix in Court of Appeals below which is part of the record herein.

(App. 73) that there was an actual loss of some half of the funds available to respondent USSF as a result of the mere service of the subpoena upon that organization. There was, in addition, substantial expert testimony as to the disastrous effect to be expected by threat of disclosure (Appellants App. 15 ff.) and the actual seriously damaging net result to USSF in particular. (App. 73 f.n.9). As to the other three consolidated cases, there were no hearings but all parties, and the Court of Appeals, have treated all as identical in these and other respects.

Petitioners have suggested (Brief p.9) that an inquiry received by respondent USSF concerning its tax exempt status might have been a cause of

damage, but the fact is that there was no evidence of any actual adverse effect from the mere inquiry.

SUMMARY OF ARGUMENT

The bank records of respondent membership organizations are functionally the equivalent of their membership lists revealing the identities of supporters and the extent of individual membership contributions. They would further reveal the nature and extent of disbursements of various associational activities protected by the First Amendment. By addressing subpoenas to the banks, the petitioners seek to secure indirectly what this Court has on numerous occasions held to be unavailable by direct subpoena. The fact that there is no traditionally or statutorily generally recognized privilege which a depositor might assert against a banker renders it all the more

necessary that the respondent-depositors have standing to enjoin or secure a declaration of invalidity against such subpoenas.

The subpoenas themselves are overbroad and vague and constitutionally void.

Petitioners have failed to allege or prove any overriding or compelling governmental interest in securing the privileged data which enforcement of the subpoenas would reveal. The fact that some or even all of the information sought may be on file with the Internal Revenue Service does not constitute a justification for access to such data by petitioners.

The service and attempted enforcement of the subpoenas at issue do not

come within the immunization of the Speech or Debate Clause of the Constitution for the reaching from the halls of Congress by subpoena toward the bank records of the respondents is an extramural act, the constitutionality of which is a proper subject for judicial review. The bar of the Speech or Debate Clause protects neither the Members of Congress nor their aides, since such protection as is offered by that Clause for intramural acts does not extend to extramural acts and the protection against litigation is identical for both Members of Congress and Congressional employees.

I.

RESPONDENTS' BANK RECORDS ARE PROTECTED BY THE FIRST AMENDMENT

A.

MEMBERSHIP LISTS AND OTHER COMPENDIA OF PERSONAL IDENTITIES, INCLUDING THOSE IN THE FORM OF BANK RECORDS, ARE BEYOND THE REACH OF THE SUBPOENAS AT ISSUE.

It is a constitutional principle of long standing that membership lists of organizations, particularly those of a politically controversial nature, are protected by the First Amendment against compulsory disclosure. The Alabama Attorney General sought disclosure of the membership list of the National Association for the Advancement of Colored People [NAACP]. When the NAACP refused to comply with a court order compelling such disclosure,

it was held in contempt. Mr. Justice Harlan, writing for a unanimous Court, ruled that Alabama could not constitutionally compel disclosure of the NAACP membership list. He stated:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

Similarly in 1960 this Court rebuffed an attempt by the City of Little Rock to obtain the membership lists of the NAACP and the identities of its official contributors. Bates v. The City of

Little Rock, 361 U.S. 516 (1960). See also Louisiana ex rel.Gremillion v. NAACP, 366 U.S. 293 (1961): Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). In fact, the principle of confidentiality of membership lists of private associations is now beyond dispute.

Respondents have argued,and the Circuit Court has agreed, that the bank records of the United States Servicemen's Fund,[1] which contain the names of both financial contributors and persons and organizations to which the organization provides financial support, are the functional equivalent of the membership records.

1. As well as those of the three other organizations involved on this consolidated record.

Nor is this a novel assertion. In Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark. 1968) aff'd per curiam, 393 U.S. 14 (1968), a case indistinguishable from this one, a District Attorney, acting as a grand jury under Arkansas law, sought to subpoena the bank records of the Arkansas Republican Party. Judge Henley, joined by Judge Harris and now Mr. Justice BLACKMUN, sitting as a three judge court, recognized the First Amendment nature of the records and said:

> These records, if produced, would reveal information not only as to sums of money contributed to the party during the 1966 campaign . . . but also would identify individual contributors from all over the State whose contributions were deposited in the account in question and would reveal the amounts of individual contributions.
> 283 F. Supp. at 251-252.

Relying on such cases as NAACP v. Alabama, supra; Bates v. City of Little Rock, supra; Louisiana ex rel Gremillion v. NAACP, supra; and Gibson v. Florida Legislative Investigation Committee, supra, the Court went on to note that such records, because they contain the identities of financial contributors, must be protected both because of the danger of reprisals against contributors resulting from disclosure, and because the mere threat of disclosure might tend to discourage both membership and contributions to the party:

> The Alabama, Arkansas, Florida, and Louisiana First Amendment cases which have been cited make it clear that the First Amendment protects freedom of association and privacy of association. It also protects freedom to participate in political life without unjustified governmental interference.

> While there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question, it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.
>
> Apart from fear of actual reprisal, many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly or subjected to the possibility of disclosure merely because an officer or agency clothed with investigatory powers may suspect that some members of their party may have violated the law. Disclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected . 283 F. Supp. at 258.

This Court per curiam affirmed the order enjoining, at the suit of an officer of the Republican Party, the enforcement of the subpoena against the

bank. The three judge Court recognized that two aspects of First Amendment interests were involved, both judicially cognizable, in a suit brought on behalf of the membership organization. First, the interest of the financial contributors in confidentiality and privacy of association because of fear of reprisal; second, the interest of a legal, albeit controversial organization to be protected against financial and political injury it would suffer if its members or financial supporters were faced with exposure. Both First Amendment interests are at stake here. It would hardly seem to require proof that many contributors and members will flee from a controversial organization in the face of a threat of exposure of their identities

but those facts were nonetheless evidentiarily established below. Not only was there expert testimony regarding the desire for anonymity on the part of the contributors to controversial organizations such as each of the respondents admittedly is, Appellant's App. A 207, A 209, A 202, A 216, A 217, A 212, A 225-7, there was also testimony from officers of respondent USSP that since knowledge of the subcommittee subpoena had become public, substantial donors had been lost to the organization (Appellants App. A 201-202). The organization lost so many contributions it had to cut its activities by half (Appellants' App. A 229-30).

B.

THE ABSENCE OF A PRIVILEGED RELATIONSHIP BETWEEN THE BANKS TO WHOM THE SUBPOENAS WERE ADDRESSED AND THE RESPECTIVE RESPONDENT-DEPOSITORS DOES NOT RENDER THE BANK RECORDS AMENABLE TO SUBPOENAS.

Petitioners have sought to ignore the obvious First Amendment nature of the records they seek by arguing that the records are the property of the bank and that there is no banker-customer privilege, such as the attorney-client privilege, which would require that those records be kept confidential. In support of their argument they cite Donaldson v. United States, 400 U.S. 517 (1971); Couch v. United States, 409 U.S. 322 (1973) and California Bankers Association v. Schultz, 416 U.S. 21, 94 S.Ct. 1494 (1974). Petitioners' argument however, and the

cases they rely on are irrelevant since neither respondents, nor the Court of Appeals in its opinion below, asserted any banker-depositor privilege but rather rest their argument on the nature of the information contained in the records and the long established First Amendment protection for that sort of information. None of the three cases relied on by petitioners above deals with First Amendment protected material. Rather, Donaldson deals with a taxpayer's effort to halt the Internal Revenue Service from obtaining routine business records of his employer, while Couch deals with a taxpayer's Fifth Amendment efforts to prevent the Internal Revenue Service [IRS] from obtaining her business records from her accountant.

Finally, California Bankers Ass'n, supra, 416 U.S. at 94 S.Ct. at 1515, deals with record keeping requirements under federal statute and expressly states that no disclosure of records had actually been sought by the government and therefore the assertion of First Amendment rights was premature.

Were there a banker-depositor or customer privilege, respondents' case might be less compelling. If each of the banks were under a duty imposed by law not to make disclosure without a waiver of privilege by the depositor in each case, each of the respondents might be asked to rely upon its bank to obey the law and respect the privilege. The absence of the availability of such a defense by the banks to the subpoenas at

issue underscores the compelling need for whatever objection to disclosure each depositor may have being asserted by that depositor in such proceedings as those herein. Thus, the argument by petitioners, stressing the absence of privilege, is in reality an argument in support of the justiciability of the issue at the suit of the respondents and presents another compelling reason for recognizing the standing of respondents to assert the First Amendment claims which each of them would undeniably have been able to present had the subpoenas been served upon them for their own records, rather than upon their bankers for the same information in the files of the banks.

Only last week the Supreme Court of California ruled that bank depositors are entitled to certain protections against disclosure of their records to police. In the case of Wesley S. Burroughs v. Superior Court of San Bernadino County, #20308 Cal. Sup. Ct. decided Dec. 27, 1974 the Court ruled that turning the records over to the police without "the scrutiny of a neutral magistrate" violates a person's reasonable expectation of privacy.*

The Court spoke of the "intimate and confidential relationship" between the bank and its depositor and recognized that "the disclosure by individuals or business of their financial

* New York Times, Jan. 2, 1975, p. 10:3 Respondents will furnish the official citation to the Court as soon as it is available.

affairs to a bank is not entirely volitional, since it is impossible to participate in the ecoromic life of contemporary society without maintaining a bank account." The Court also noted that bank records provide "a virtual current biography" of the depositor's personal affairs, opinions, habits and associations.

For these reasons, the California Supreme Court concluded that the police may not have access to a depositor's records free from judicial scrutiny at the request of the depositor.

This principle which the Supreme Court of California has just applied to an individual depositor certainly applies as well to a First Amendment protected organization. It is this judicial

scrutiny which respondents sought and the Court of Appeals correctly provided, determining that petitioners' efforts to obtain the bank records in question were in violation of the First Amendment.

C.

THE ABSENCE OF AN OVERRIDING AND COMPELLING STATE INTEREST FOR SECURING THE DATA REQUIRES INVALIDATION OF THE SUBPOENAS.

1. **Petitioners have not met their burden of proof.**

Petitioners attempt to evade the requirements of the First Amendment and to distinguish NAACP v. Alabama and the other cases we cite above by argument that the records of the NAACP had been protected in those cases because improper purposes on the part of state officials had been alleged and proven and by asserting that "there is no such proof here." (Petitioners' brief, p. 42.) This, however, is an incorrect statement of both the law and the facts. Once it is apparent that the information sought by the government falls within the

protection of the First Amendment, it is no longer the burden of the person or organization seeking protection to prove improper purposes, but rather, the burden shifts to the government to establish a compelling and overriding state interest and need for the information. Invalidating the subpoena of a Legislative Investigating Committee for NAACP records, Mr. Justice Goldberg, writing for a majority of the court observed:

> . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. Gibson v. Florida Legislative Investigation Committee, supra, 372 U.S. at 546.

Here, not only have petitioners failed to establish any compelling

need for the disclosure of First Amendment protected information, they have established virtually no justification at all other than their unsupported desire for the information.

The closest petitioners come to an explanation of their need for USSF's contributors list, or a connection with some alleged purpose, is found in the resolution of the subcommittee authorizing the challeged subpoena. That resolution states as follows:

> Whereas, information collected pursuant to the Subcommittee's resolution of October 14, 1967 /authorizing the investigation of the National Conference for New Politics/ makes a prima facie showing that the organizations and individuals hereinafter named should be subject of further investigation, it is directed that such investigation be carried forward by the

> staff; and that when the Chairman shall conclude that the results of staff investigation with respect to any such person or organization indicate the desirability of a hearing or hearings, the Chairman is authorized to issue appropriate subpoenas, including subpoenas duces tecum, to insure attendance of necessary witnesses and the production, if required, of material evidence. (App. 127).

That resolution goes on to list three pages of individuals and organizations which were presumably under the scrutiny of the suhcommittee, only one of which was respondent USSF.[3]

That resolution certainly does not meet the compelling need standards of Gibson and the other First Amendment cases. Nor, for that matter, has any

3. The identity of 3 or 4 of those individuals and organizations became public as a result of other litigation. The remaining three pages of names have remained secret.

connection been established by petitioners between the National Conference for New Politics [NCNP], the organization the subcommittee was purportedly authorized to investigate on October 14, 1967, and the United States Servicemen's Fund. In fact, it would have been difficult to demonstrate such a relationship since, as petitioners established at trial, NCNP was dissolved in April 1968 (Appellants' App. A 140), nine months before USSF was even incorporated. (Appellant's App. A 147).

In Gibson, this Court held that the NAACP could not be compelled to turn over its membership list to a legislative investigating committee where there had been no showing of "substantial connection between the Miami branch of

the NAACP and Communist activities" 372 U.S. at 551. Elsewhere there is noted "the utter failure to demonstrate the existence of any substantial relationship between the NAACP and subversive or communist activities." 372 U.S. at 354-5. Thus, inquiry into the membership of a legitimate civil rights organization would be permitted only if some connection with allegedly illegal activities could be shown.

Not only have petitioners failed to show any relationship between the NCNP and the United States Servicemen's Fund, even if such a relationship were demonstrated it would be insufficient to support this investigation and therefore the challeged subpoena. For there is no indication that

the NCNP was, during its short existence, anything but a legitimate political organization protected by the First Amendment. Here where no connection with illegal activity has even been alleged, and where the link with the perfectly legal and in fact constitutionally protected organization is non-existent, there is no justification for the use by defendants of compulsory process.[4] For as this Court concluded in Gibson:

> It is particularly important that

4. What is more, there is a substantial question as to whether the authorization of the investigation of the NCNP itself meets the tests of due process as set forth in Watkins v. United States, supra, and Yellin v. United States, 374 U.S. 109 (1963). And, or course, under the principles of Gojack v. United States, supra, if the authorization for the investigation of the NCNP falls, the authorization of the challeged subpoena must also fall.

> the exercise of the power of compulsory process be carefully circumscribed when this investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.***
>
> To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in the exercise of First and Fourteenth Amendment rights; to impose a lesser standard than we do here would be inconsistent with the maintenance of those essential conditions basic to the preservation of American democracy. 372 U.S. at 558.

2. Direction of the subpoenas to the banks rather than to organizations directly concerned has not been explained or justified by petitioners.

Since the information sought by the respective subpoenas is admittedly (petitioners' brief p. 40) in the records required by law to be kept by each of the respondents, and since a

subpoena served upon each of the respondents would have made it possible for a forum to be available for the assertion of the rights of each respondent, it is respectfully urged that petitioners have a burden to show not only an overriding and compelling state interest for the otherwise privileged information, but the burden of establishing that such information is not available from other sources such as the respondents directly. To permit service of such indirect subpoenas when such information is available from each of the organizations directly would be to emasculate the rules established by NAACP v. Alabama and the other cases cited above. It is precisely this position which is argued by petitioners,

apparently admitting that the Speech or Debate Clause would form no defense to an attack upon a direct subpoena subject to judicial review, but somehow providing a device for circumvention of the First Amendment by employment of the indirect or other devious subpoenas here attempted. Respondents urge that this Court articulate, in addition to the Gibson rule, calling for an over-riding and compelling state interest, the additional requirement that a subpoena to a third party for material within the ambit of the First Amendment cannot be validly issued or enforced at least in absence of a showing, in addition, that sensitive information sought cannot be procured by direct means.

"The State clearly has no

such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." Speiser v. Randall, 357 U.S. 513, 529 (1958).

D.

THE SUBPOENAS ARE OVERBROAD AND THEREFORE VOID.

The four subpoenas at issue (App. 119-123) are substantially identical, calling for "any and all records appertaining to or involving the account or accounts of" the respondents respectively. They seek not only records of deposits and withdrawals but "all papers, correspondence, statements, checks, deposit slips and supporting documentation or microfirm thereof within your control or custody of within your means to

produce." Not only do these subpoenas seek every scrap of paper or other record in any way dealing with each of the respondents, but they purport to require the bank in each case "to produce" what they may have the means to go elsewhere to acquire from other sources. If indeed, the petititioners are interested in ascertaining only what may bear upon possible foreign sources of funding or other limited area of inquiry, the net has been thrown too wide and the interstices drawn too small. Petitioners make much argument to establish that the committees of Congress have the right to issue subpoenas duces tecum. Respondents do not argue with that general proposition. Respondents do contend, however, that a

subpoena must not only be properly authorized and must be issued in a manner providing due process of law in an appriate forum to persons whose First Amendment rights are threatened thereby, but that each such subpoena which impinges upon the area protected by the First Amendment must be drawn with that "narrow specificity" which this Court has required when the delicate and vulnerable freedoms of the First Amendment are involved. NAACP. v. Button, 371 U.S. 415, 433 (1963).

E.

THE FACT THAT THE DATA WHICH THE RESPONDENTS SEEK TO PROTECT AND PETITIONERS SEEK TO INVADE MAY IN PART BE ON FILE WITH THE INTERNAL REVENUE SERVICE DOES NOT DESTROY RESPONDENTS' FIRST AMENDMENT RIGHTS.

Petitioners argue that the law requires that tax exempt organizations such as the respondents must file with the Internal Revenue Service regular reports of receipts and disbursements, including identification of donors (and thereby members) and grantees. Respondents have complied but, as petitioners have pointed out (brief of petitioners p. 41),the IRS reports are confidential except with narrow, specific, statutory exceptions not including petitioners. Because respondents have complied with the Internal Revenue Code, petitioners would have it appear that they have thus somehow waived First Amendment rights. If this were so, every tax exempt organization would ipso facto be deprived of associational

privacy under the First Amendment. The fact that Congress has seen fit specifically to limit access to this delicate data to a limited number of governmental agents having specific need therefor (26 U.S.C. 6103(d)(1)(A)) would seem to establish a specific intent to preclude access by such committees as petitioners.

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PREVENT COURTS FROM CONSIDERING THE CONSTITUTIONALITY OF A CONGRESSIONAL COMMITTEE SUBPOENA BEFORE COMPLIANCE WHEN A FAILURE TO GIVE SUCH CONSIDERATION WOULD IN AND OF ITSELF RESULT IN SERIOUS DEPRIVATION OF FIRST AMENDMENT RIGHTS.

A.

FEDERAL COURTS ARE CONSTITUTIONALLY REQUIRED IN APPROPRIATE CASES TO PASS UPON THE CONSTITUTIONALITY OF CONGRESSAL SUBPOENAS.

It is beyond dispute that the federal courts have the power to rule on the constitutionality of a Congressional committee subpoena. See, United States v. Rumley, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178 (1957); Gojack v. United States, 384 U.S. 702 (1966); Yellin v. United States, 374 U.S. 109 (1963). That is all the Court of Appeals did below - it considered the constitutionality of a subponea issued by the Eastland Committee and found that it violated the First Amendment.

As the Court below noted, not even

petitioners can contend that the Speech or Debate Clause constitutes a "textually demonstrable commitment" of the issues to the Congress.

> The government does not contend that the Speech or Debate Clause, Art. 1, Sec. 6, Cl. 1 of the constitution is such a commitment and since it could not seriously be contended that the acts giving effect to the committee resolution (like the conduct of the Sergeant at Arms in the Kilbourn case) are within the protection of the Speech or Debate Clause, this Clause does not commit to the Senate the power to determine the legality of the subpoena. USSF v. Eastland, supra. App 67.

B.

THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE FROM JUDICIAL REVIEW ALL ALLEGEDLY UNCONSTITUIONAL ACTS BY MEMBERS OF CONGRESS AND THEIR AIDES.

Although petitioners did not even mention the Speech or Debate Clause in

the Court of Appeals (they did in the District Court which rejected their contentions), they now vigorously assert that the Clause prevents the federal courts from scrutinizing the subpoenas herein, immunizing members of Congress and their aides from even federal declaratory and injunctive actions which challege the constitutionality of their actions, no matter what their nature.

Petitioners base the sweeping ban they would have this Court apply on eight cases in which this Court dealt with Speech or Debate Clause. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S.

486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966) Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881). The conclusions petitioners draw from those cases misconstrue the rulings of this Court which have, in fact, permitted not only declaratory and injunctive relief but civil damages and back pay against employees of Congress and legislative aides. Kilbourn v. Thompson, supra; Powell v. McCormack, supra; Dombrowski v. Eastland, supra.

In its most recent discussion of immunity, this Court reiterated that there are limits to the protections of the Speech or Debate Clause.As this Court noted in Gravel v. United States,

408 U.S. 606, 621 (1972):

> None of this, as we see it involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966). (emphasis added)

Respondents contend that the seizure of their lists of depositors,

deposits, grantees and grants by use of unconstitutional subpoenas upon their banks is no less an illegal act than if the Members of Congress themselves or their aides, without color of such process" themselves seized the property" and thus "invaded the privacy of [the] citizens[s]." Therefore, "[n]either they nor their aides should be immune from ... question in such circumstances."

It is to be noted in this connection that the Gravel opinion does not shrink from withdrawing immunity even from liability although these respondents seek merely injunctive and declaratory relief.

Earlier, in Powell v. McCormack, supra, this Court reviewed the

long history of our Speech or Debate Clause and its British antecedents and outlined three different questions which arose regarding its application:

> 1. Whether respondents in participating in the exclusion of Powell were 'acting in the sphere of legitimate legislative activity,' Tenney v. Brandhove, supra at 376, 71 S.Ct. at 788;
> 2. Assuming that respondents were so acting, whether the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lifts the bar of the clause; and
> 3. Even if this action may not be maintained against a Congressman, whether those respondents who are merely employees of the House may plead the bar of the clause.
>
> Powell v. McCormack, supra, 395 U.S. at 501-2. (footnotes omitted).

This Court then went on to say "we find it necessary to treat only the last of these issues," 395 U.S. at 502, and held that the Speech or Debate Clause does not act as a bar to action for

declaratory and injunctive relief(as well as back pay) against an employee of the House, even where the question was the constitutionally sensitive one of the decision by the House of Representatives to exclude one of its own members from the body.

In so deciding, this Court looked back to Kilbourn and Dombrowski, noting that the purpose of the Clause was to protect members of Congress from the distractions of litigation and that they would not be distracted by litigation against congressional employees.

As a matter of practice and reality, no Members are in fact "distracted" by litigation such as in the instant cases any more than they are "distracted" by a case involving an

attempt to punish an alleged violator of one of their subpoenas for contempt. Even when the Members are defendants, the situation is unchanged for they have the privilege (normally exercised by them) of legal representation by the Department of Justice and, should they chose for reasons of their own to retain private counsel, there are Committee budgets for that purpose. The fact that a Congressperson or Senator might be called for deposition or other testimony in the course of an action such as those here at issue is no different from the situation where such a legislator might be called to testify in a contempt prosecution as to the legislative purpose, scope and intent of the authorizing resolution or other

relevant fact. As has been most dramatically illustrated for all of us recently, not even the holder of the highest office is immune from judicial process.

There is thus no interference with legislative activity because the Federal courts have and are called upon to exercise their constitutional obligation to review the constitutionality of Congressional actions. As Mr. Chief Justice Warren stated:

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than

> he would be by a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves. Powell v. McCormack, supra, 505.

This case is remarkably similar to Powell v. McCormack in that the defendants in each of these four actions include staff counsel of the Committee or subcommittee concerned. Although respondents urge, in conformity with Gravel and the opinion of the Court of Appeals herein, that Members have no broader immunity than their aides, full relief for the respondents in these cases may be decreed against

the defendant aide in each case. This Court may, thus, if it wishes, defer consideration of the immunity of the Members under the Speech or Debate Clause. Respondents most strongly argue, however, that the Court below was correct in retaining the Member defendants since their asserted immunity does not reach the issues posed by these cases.

C.

THE ACTIONS CHALLEGED IN THIS LITIGATION ARE NEITHER SPEECH NOR DEBATE.

In rejecting the Speech or Debate Clause as a bar to Federal Court action herein, the Court of Appeals drew a distinction between internal and external acts of Members. Looking back to Doe v. McMillan, supra, it noted that

litigation was barred against Members of Congress concerning text of a committee report or the introduction of particular material at a Committee hearing. Just as in United States v. Brewster, 408 U.S. 501 (1972) and United States v. Johnson, 383 U.S. 169 (1966), where the contents and motivation of floor speeches could not be criminally dealt with (although criminal and conspiratorial extramural acts with respect thereto could be), these internal Committee acts were held in McMillan to be purely intramural functions of the Congress just as literal speech or debate are such internal functions. In contrast to such internal activities within the ambit of the Speech or Debate Clause are activities of Members beyond the halls of Congress.

Should the Member go to the general public and read the same report with respect to which his contributions and activities inside Congress are protected by the Clause, his or her immunity from suit would disappear. "A Member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official Committee report." USSF v. Eastland, supra, App. 68 quoted from Doe v. McMillan, supra.

The Court below then went on:

> Analogizing to the instant case, we think the Speech or Debate Clause does protect the senatorial parties from liability for authorizing even an unconstitutional subpoena, but does not protect whatever parties issue or

serve such a subpoena upon a third party. App. 68.

To state this proposition another way, when a Congressperson authorizes a subpoena, that is a purely legislative act for which he or she cannot be sued. When, however, he or she causes that subpoena, which carries the possibility of judicial enforcement, to be served, the congressperson has reached beyond the walls of Congress and such acts become subject to judicial scrutiny. The acts for which Senator Gravel and his aides were immunized was a traditionally protected act, the giving of a speech in Congress, not the reaching beyond the walls of the Senatein order to compel a private citizen or organization to appear before Congress or turn over private documents. Once the Member or

aide reaches out to the private citizen with compulsory process, such an act cannot realistically, traditionally, or legally be termed Speech or Debate within the meaning of the constitutional provision.

The real question that remains then, is, not whether the Court can act but how it can do so in such a way as to avoid "'needless friction' with a coordinate branch of the government" U.S.S.F. v. Eastland, supra, App. 58, quoting Ansara v. Eastland, 442 F. 2d 751, 753 (D.C. Cir. 1971). Or as the Court of Appeals stated only one year later herein:

> The judiciary has the duty 'of not lightly interfering with Congress' exercise of its legitimate powers.'
> U.S.S.F. v. Eastland, supra,

App. 58, quoting Sanders v. McClellan, 463 F. 2d 894, 902 (D.C. Cir. 1972).

The Court below went on to note that because of the desire not to interfere needlessly with Congress, the court has generally been unwilling to review the constitutionality of a federal subpoena prior to a proceeding for criminal contempt, and has therefore withheld equitable relief. The theory behind this policy, as articulated in Ansara v.Eastland, supra is that there will be several points at which the subpoenaed party can raise constitutional claims, including at the Subcommittee, Committee, house and trial court. The court noted however, that even the government has recognized that there is one major exception to that rule - when

the subpoena is served on a third party. Quoting again from Ansara v. Eastland, at App 61, the court stated:

> ... we first note that the plaintiffs will have an opportunity to present their constitutional objections to the Sub-Committee. Hence the case is to be distinguished, as government counsel points out, from one where plaintiffs were not subpoenaed and would have no way to claim their constitutional protections at the time of the committee's questioning.

The heart of this case is that if the federal court does not offer the relief plaintiffs' requested, there will be no relief at all. For as even the District Court recognized:

> Plaintiffs are not required to entrust the task of protecting their First Amendment rights to a third party [the Bank] which has little interest in doing so. See McSurely v. McClellan, No. 23, 845 (D.C. Cir. March 26, 1970), Slip Opinion at 8. Perlman v. United States, 247 U.S. 7, 12-13 (1918).

U.S.S.F. v. Eastland, Civ. Act,

No. 1474-70, June 4, 1970 (App. 25).

It is particularly important that plaintiffs-respondents have a remedy of their own if, as petitioners argue, there is no bank-depositor privilege which requires the bank to protect its depositor's records and assert its constitutional rights.

We are therefore in the situation which the Court of Appeals foresaw in Sanders and Ansara or, as the court below stated:

> Here, in this case, we have the case which is distinguished by this Court in both Sanders and Ansara and apparently by the government in its argument in the latter case. Here the plaintiffs have no alternative means to vindicate their rights. They cannot contest a subpoena issued on the Chemical Bank before the committee or before the Senate, and they cannot force the bank's uninvolved officials to run the

> risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.
> U.S.S.F. v. Eastland, supra, App. 61.

There are admittedly few situations in which the federal courts will exercise their jurisdiction to review a Congressional subpoena prior to compliance therewith or violation thereof. Such cases do, however, exist. One of them this Court recognized recently in United States v. Nixon, ____U.S. _____, 94 S.Ct. 3090,(1974) There the Court said (at 3099):

> The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918) a subpoena had been directed to a third party requesting

certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. Id., at 12-13, 38 S.Ct. at 419-420. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." United States v. Ryan, supra, 402 U.S., at 533, 91 S. Ct., at 1582.

CONCLUSION

By arguing that the subpoenas are immune from judicial scrutiny by the respondents whose interests are most intimately involved in protecting the data sought, petitioners distort both the factual setting and the applicable law. Petitioners seek by indirect means of the bank subpoena to secure that very body of information which this Court has repeatedly held cannot be secured by direct means.

Petitioners rest heavily upon Alexander v. Americans United, _____U.S. _____, 94 S.Ct. 2053 (1974). That case, however, like Ansara v. Eastland, supra, serves only to underscore why Federal Court scrutiny and protective action in cases such as this are both appropriate

and necessary. As the Ansara court predicted when it refused to enjoin a subpoena directly served upon interested persons in possession of information respecting freedom of association and as this Court held in Americans United, anticipatory relief was not available because the interested parties had an alternative remedy, to wit, the ordinary process of review in one case in enforcement proceedings under a subpoena and the other under the provisions of the Internal Revenue Code. The absence of such alternative remedy for the respondents in this case requires that the Judiciary perform its constitutional duty in providing a forum for assertion and protection of First Amendment rights.

The protection of dissent and freedom of association are cornerstones of a free society and, although the sensibilities of members of one branch of government may be irritated when the judiciary exercises its mandate to provide the checks and balances contemplated by the Constitution, the courts have traditionally not shirked this responsibility.

Dated: January 3, 1975

Respectfully submitted,

NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

JEREMIAH S. GUTMAN
c/o American Civil Liberties Union Foundation
363 Seventh Avenue
New York, N.Y. 10001

BURT NEUBORNE
American Civil Liberties
Union
22 East 40th Street
New York, N.Y. 10016

PHILIP J. HIRSCHKOP
503 D Street, N.W.
Washington, D.C.

HOPE EASTMAN
American Civil Liberties
Union
410 First Street, S.E.
Washington, D.C.

Attorneys for Respond-
ents